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# THE

# LAWS OF ENGLAND.

VOLUME X.

Law. I
H 196.3
Halsbury, "

# THE

# LAWS OF ENGLAND

BEING

## A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

**EARL OF HALSBURY**

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895-1905,

AND OTHER LAWYERS.

## VOLUME X.

*CROWN PRACTICE.*
*CUSTOM AND USAGES.*
*DAMAGES.*
*DEEDS AND OTHER INSTRUMENTS.*
*DEPENDENCIES AND COLONIES.*

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*Bills of Sale* - - - ,, BILLS OF SALE.
*Bonds* - - - - - ,, BONDS.
*Contracts* - - - - - ,, BUILDING CONTRACTS; CONTRACT.
*Covenants running with the Land* ,, CONTRACT; LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL.
*Deeds of Arrangement* - ,, BANKRUPTCY AND INSOLVENCY.
*Documentary Evidence* - ,, EVIDENCE.
*Negotiable Instruments* - ,, BILLS OF EXCHANGE ETC.
*Registration of Deeds* - - ,, REAL PROPERTY AND CHATTELS REAL.
*Shipping Documents* - - ,, SHIPPING AND NAVIGATION.
*Testamentary Documents* - ,, WILLS.

## DEEDS OF ASSIGNMENT.

*See* BANKRUPTCY AND INSOLVENCY.

## DEER.

*See* GAME.

## DEFAMATION.

*See* LIBEL AND SLANDER.

## DEFEASANCE.

*See* BONDS; MORTGAGE; TRUSTS AND TRUSTEES.

DEL CREDERE AGENT.

*See* AGENCY; SALE OF GOODS.

DELEGATION.

*See* AGENCY.

DEMISE.

*See* LANDLORD AND TENANT.

DEMISE OF THE CROWN.

*See* CONSTITUTIONAL LAW.

DEMURRAGE.

*See* SHIPPING AND NAVIGATION.

DENTISTS.

*See* MEDICINE AND PHARMACY.

DEODAND.

*See* CORONERS.

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*For Colonial Solicitors* - - - - - - - *See title* SOLICITORS.
*Judicial Committee of the Privy Council* - - ,, COURTS.

## DEPOSITION.

*See* EVIDENCE.

# ABBREVIATIONS

## USED IN THIS WORK.

| | |
|---|---|
| A. C. (preceded by date) | Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.) |
| A.-G. | Attorney-General |
| Act. | Acton's Reports, Prize Causes, 2 vols., 1809—1811 |
| Ad. & El. | Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831—1842 |
| Adam | Adam's Justiciary Reports (Scotland), 1893—(current) |
| Add. | Addams' Ecclesiastical Reports, 3 vols., 1822—1826 |
| Adv.-Gen. | Advocate-General |
| Alc. & N. | Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833 |
| Alc. Reg. Cas. | Alcock's Registry Cases (Ireland), 1 vol., 1832—1841 |
| Aleyn | Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649 |
| Amb. | Ambler's Reports, Chancery, 2 vols., 1725—1783 |
| And. | Anderson's Reports, Common Pleas, fol., 1 vol., 1535—1605 |
| Andr. | Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740 |
| Anon. | Anonymous |
| Anst. | Anstruther's Reports, Exchequer, 3 vols., 1792—1797 |
| App. Cas. | Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890 |
| Arkley | Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848 |
| Arm. M. & O. | Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842 |
| Arn. | Arnold's Reports, Common Pleas, 2 vols., 1838—1839 |
| Arn. & H. | Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841 |
| Asp. M. L. C. | Aspinall's Maritime Law Cases, 1870—(current) |
| Atk. | Atkyns' Reports, Chancery, 3 vols., 1736—1754 |
| Ayl. Pan. | Ayliffe's New Pandect of Roman Civil Law |
| Ayl. Par. | Ayliffe's Parergon Juris Canonici Anglicani |
| B. & Ad. | Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834 |
| B. & Ald. | Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822 |
| B. & C. | Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830 |
| B. & S. | Best and Smith's Reports, Queen's 10 vols., Bench, 1861—1870 |
| Bac. Abr. | Bacon's Abridgment |
| Bail Ct. Cas. | Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854 |
| Ball & B. | Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814 |
| Bankr. & Ins. R. | Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 |

| | |
|---|---|
| Bar. & Arn. .. .. | Barron & Arnold's Election Cases, 1 vol., 1843—1846 |
| Bar. & Aust. .. .. | Barron & Austin's Election Cases, 1 vol., 1842 |
| Barn. (CH.) .. .. | Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 |
| Barn. (K. B.) .. .. | Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734 |
| Barnes .. .. .. | Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760 |
| Batt. .. .. .. | Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826 |
| Beat. .. .. .. | Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 |
| Beav. .. .. .. | Beavan's Reports, Rolls Court, 36 vols., 1838—1866 |
| Beav. & Wal. .. .. | Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846 |
| Beaw. .. .. .. | Beawes's Lex Mercatoria |
| Bellewe .. .. .. | Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol. |
| Bell, C. C. .. .. | T. Bell's Crown Cases Reserved, 1 vol., 1858—1860 |
| Bell, Ct. of Sess. .. | R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792 |
| Bell, Ct. of Sess. fol. .. | R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795 |
| Bell, Dict. Dec. .. | S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833 |
| Bell, Sc. App. .. .. | S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850 |
| Belt's Sup. .. .. | Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756 |
| Benl. .. .. .. | Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627 |
| Ben. & D. .. .. | Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579 |
| Bing. .. .. .. | Bingham's Reports, Common Pleas, 10 vols., 1822—1834 |
| Bing. (N. C.) .. .. | Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 |
| Bitt. Prac. Cas. .. .. | Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876 |
| Bitt. Rep. in Ch. .. | Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884 |
| Bl. Com. .. .. .. | Blackstone's Commentaries |
| Bl. D. & Osb. .. .. | Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848 |
| Bli. .. .. .. | Bligh's Reports, House of Lords, 4 vols., 1819—1821 |
| Bli. (N. S.) .. .. | Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837 |
| Bos. & P. .. .. | Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804 |
| Bos. & P. (N. R.) .. | Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807 |
| Bract. .. .. .. | Bracton De Legibus et Consuetudinibus Angliæ |
| Bro. Abr. .. .. | Sir J. Brooke's Abridgment |
| Bro. C. C. .. .. | W. Brown's Chancery Reports, 4 vols., 1778—1794 |
| Bro. Ecc. Rep. .. .. | W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872 |
| Bro. (N. C.) .. .. | Sir R. Brooke's New Cases, 1 vol., 1515—1558 |
| Bro. Parl. Cas. .. .. | J. Brown's Cases in Parliament, 8 vols., 1702—1800 |
| Bro. Supp. to Mor. .. | M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols. |
| Bro. Synop. .. .. | M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827 |
| Brod. & Bing. .. .. | Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822 |

| | |
|---|---|
| Brod. & F. .. .. | Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864 |
| Broun .. .. .. | Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 |
| Brown. & Lush. .. | Browning and Lushington's Reports, Admiralty 1 vol., 1863—1866 |
| Brownl. .. .. .. | Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624 |
| Bruce .. .. .. | Bruce's Decisions, Court of Session (Scotland), 1714—1715 |
| Buchan. .. .. .. | Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813 |
| Buck .. .. .. | Buck's Cases in Bankruptcy, 1 vol., 1816—1820 |
| Bulst. .. .. .. | Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626 |
| Bunb. .. .. .. | Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741 |
| Burr. .. .. .. | Burrow's Reports, King's Bench, 5 vols., 1756—1772 |
| Burr. S. C. .. .. | Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776 |
| Burrell .. .. .. | Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840 |
| C. A. .. .. .. | Court of Appeal |
| C. B. .. .. .. | Common Bench Reports, 18 vols., 1845—1856 |
| C. B. (N. S.) .. .. | Common Bench Reports, New Series, 20 vols., 1856—1865 |
| C. C. Ct. Cas. .. .. | Central Criminal Court Cases (Sessions Papers), 1834—(current) |
| C. L. R. .. .. .. | Common Law Reports, 3 vols., 1853—1855 |
| C. P. D. .. .. .. | Law Reports, Common Pleas Division, 5 vols., 1875—1880 |
| C. & P. .. .. .. | Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841 |
| Cab. & El. .. .. | Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885 |
| Cald. Mag. Cas. .. | Caldecott's Magistrates Cases, 1 vol., 1777—1786 |
| Calth. .. .. .. | Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618 |
| Camp. .. .. .. | Campbell's Reports, Nisi Prius, 4 vols., 1807—1816 |
| Carp. Pat. Cas. .. .. | Carpmael's Patent Cases, 2 vols., 1602—1842 |
| Car. & Kir. .. .. | Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1815—1853 |
| Car. & M. .. .. | Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843 |
| Cart. .. .. .. | Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673 |
| Carth. .. .. .. | Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700 |
| Cary .. .. .. | Cary's Reports, Chancery, 1 vol. |
| Cas. in Ch. .. .. | Cases in Chancery, fol., 3 parts, 1660—1697 |
| Cas. Pract. K. B. .. | Cases of Practice, King's Bench, 1 vol., 1655—1775 |
| Cas. Sett. .. .. | Cases of Settlements and Removals, 1 vol., 1689—1727 |
| Cas. *temp.* Finch .. | Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680 |
| Cas. *temp.* King .. | Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733 |
| Cas. *temp.* Talb. .. .. | Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737 |
| Ch. (preceded by date) .. | Law Reports, Chancery Division, since 1890 (*e.g.* [1891] 1 Ch.) |
| Ch. App. .. .. .. | Law Reports, Chancery Appeals, 10 vols., 1865—1875 |
| Ch. D. .. .. .. | Law Reports, Chancery Division, 45 vols., 1875—1890 |
| Ch. Rob. .. .. .. | Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808 |

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|---|---|
| Char. Pr. Cas. .. .. | Charley's New Practice Reports, 3 vols., 1875—1876 |
| Char. Cham. Cas. .. | Charley's Chamber Cases, 1 vol., 1875—1876 |
| Chit. .. .. .. | Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822 |
| Cl. & Fin. .. .. | Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846 |
| Clay. .. .. .. | Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650 |
| Clif. & Rick. .. .. | Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884 |
| Clif. & Steph. .. .. | Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872 |
| Cockb. & Rowe .. .. | Cockburn and Rowe's Election Cases, 1 vol., 1833 |
| Co. Ent. .. .. .. | Coke's Entries |
| Co. Inst. .. .. .. | Coke's Institutes |
| Co. Litt. .. .. .. | Coke on Littleton (1 Inst.) |
| Co. Rep. .. .. .. | Coke's Reports, 13 parts, 1572—1616 |
| Coll. .. .. .. | Collyer's Reports, Chancery, 2 vols., 1844—1846 |
| Coll. Jurid. .. .. | Collectanea Juridica, 2 vols. |
| Colles .. .. .. | Colles' Cases in Parliament, 1 vol., 1697—1713 |
| Colt. .. .. .. | Coltman's Registration Cases, 1 vol., 1879—1885 |
| Com. .. .. .. | Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740 |
| Com. Cas. .. .. | Commercial Cases, 1895—(current) |
| Com. Dig. .. .. | Comyns' Digest |
| Comb. .. .. .. | Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698 |
| Con. & Law. .. .. | Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843 |
| Cooke & Al. .. .. | Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834 |
| Cooke, Pr. Cas. .. | Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747 |
| Cooke, Pr. Reg. .. .. | Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742 |
| Coop. G. .. .. .. | G. Cooper's Reports, Chancery, 1 vol., 1792—1815 |
| Coop. Pr. Cas. .. .. | C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838 |
| Coop. *temp.* Brough. .. | C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834 |
| Coop. *temp.* Cott. .. | C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases) |
| Corb. & D. .. .. | Corbett and Daniell's Election Cases, 1 vol., 1819 |
| Couper .. .. .. | Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 |
| Cowp. .. .. .. | Cowper's Reports, King's Bench, 2 vols., 1774—1778 |
| Cox, C. C. .. .. | E. W. Cox's Criminal Law Cases, 1843—(current) |
| Cox & Atk. .. .. | Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846 |
| Cox, Eq. Cas. .. .. | S. C. Cox's Equity Cases, 2 vols., 1745—1797 |
| Cox, M. & H. .. .. | Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852 |
| Cr. & J. .. .. .. | Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832 |
| Cr. & M. .. .. .. | Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834 |
| Cr. M. & R. .. .. | Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835 |
| Cr. & Ph. .. .. | Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 |
| Cr. App. Rep. .. .. | Cohen's Criminal Appeal Reports, 1909 (current) |
| Craw. & D. .. .. | Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846 |

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|---|---|
| Craw. & D. Abr. C. .. | Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838 |
| Cress. Insolv. Cas. .. | Cresswell's Insolvency Cases, 1 vol., 1827—1829 |
| Cripps' Church Cas. .. | Cripps' Church and Clergy Cases, 2 parts, 1847—1850 |
| Cro. Car. .. .. | Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641 |
| Cro. Eliz. .. .. | Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603 |
| Cro. Jac. .. .. | Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625 |
| Cru. Dig. .. .. | Cruise's Digest of the Law of Real Property, 7 vols. |
| Cunn. .. .. .. | Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735 |
| Curt. .. .. .. | Curteis' Ecclesiastical Reports, 3 vols., 1834—1844 |
| Dalr. .. .. .. | Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720 |
| Dan. .. .. .. | Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 |
| Dan. & Ll. .. .. | Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 |
| Dav. & Mer. .. .. | Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844 |
| Dav. Pat. Cas. .. .. | Davies' Patent Cases, 1 vol., 1785—1816 |
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# Part I. — Proceedings on the Revenue Side of the King's Bench Division.

## SECT. 1.—*Latin Informations.*

### SUB-SECT. 1.—*Nature and Classification of Latin Informations.*

Latin informations.

**1.** The Latin information is the method by which the King, in right of the Crown or of the Duchy of Lancaster, or the Duke of Cornwall recovers money or other chattels by way of damages or otherwise; it corresponds to an action by the subject for similar purposes. It is filed in the King's Remembrancer's Department, and the subsequent proceedings take place on the Revenue side of the King's Bench Division. It is so called because the Law Officer of the Crown or of the Duke of Cornwall, who files it, gives the court to understand and be informed of the facts which it alleges, and because the pleadings were formerly in the Latin language. Where the debt of the Crown is a debt of record, the strictly correct mode of recovery is by *scire facias* or extent, but even in this case a Latin information can be filed on the record (*a*). Latin

(*a*) 3 Bl. Com. 261; *A.-G.* v. *Sewell* (1838), 4 M. & W. 77. As to the Crown generally, see title CONSTITUTIONAL LAW, Vol. VI., pp. 320 *et seq.*; Vol. VII., pp. 1 *et seq.*; as to the Duchy of Lancaster, see *ibid.*, Vol. VII., pp. 217 *et seq.*; as to the Duchy of Cornwall, see *ibid.*, Vol. VII., pp. 238 *et seq.* Informations in the High Court on behalf of the Crown in right of the Duchy of Lancaster

informations are divided into informations *in rem* and informations *in personam*.

SUB-SECT. 2.—*Informations in Rem.*

Informations *in rem*.

**2.** Informations *in rem* fall into two classes—(1) where the Crown is in possession of property and claims a declaration that it is entitled to it; (2) where the Crown lays claim to property which is in the hands of some person or corporation other than the Crown or its officers. This latter form is known as an information of *devenerunt* (*b*).

The most usual subject-matter of an information *in rem* is property alleged to have been forfeited under the Acts relating to the Customs or the Inland Revenue, whether ships or goods (*c*). It is sufficient evidence that such an information has been authorised by the Commissioners of Customs or Inland Revenue if an averment to that effect is contained in the information (*d*).

Information of *devenerunt*.

**3.** The information of *devenerunt*, as its title shows, is based upon the fact that the property claimed by the Crown has "come into" the hands of some person or corporation other than the Crown or its officers. The proper allegation in such an information is merely that the property has come into the hands of such person or corporation, and not that it has been converted by them, inasmuch as, in law, the King cannot be put out of possession (*e*). The proper answer is merely that it has not come into his or their hands (*f*).

SUB-SECT. 3.—*Informations in Personam.*

Informations *in personam*.

**4.** Informations *in personam* are of two main species—(1) of intrusion, whereby the Crown claims to remove intruders on its lands and possessions, and to recover the profits and damages for the intrusion; (2) of debt, whereby the Crown claims sums due to it by way of penalty or otherwise (*g*).

Information of intrusion.

**5.** The information of intrusion lies for intrusion of any kind on hereditaments of the King of whatever nature and of whatever sort of tenure (*h*). All persons in actual possession must be made

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must be filed by the Attorney-General, and not by the Attorney-General of the Duchy (*A.-G. of the Duchy of Lancaster* v. *Devonshire* (*Duke*) (1884), 14 Q. B. D. 195).

(*b*) 3 Bl. Com. 261, 262; Manning, Exchequer Practice, 2nd ed., p. 142.

(*c*) See title REVENUE.

(*d*) Excise Management Act, 1827 (7 & 8 Geo. 4, c. 53), s. 71; *Hargreaves* v. *Hilliam* (1894), 58 J. P. 364; *Dyer* v. *Tulley*, [1894] 2 Q. B. 794.

(*e*) *Friend* v. *Richmond* (*Duke*) (1667), Hard. 460; *Doe* d. *Watt* v. *Morris* (1835), 2 Bing. (N. C.) 189, 196.

(*f*) In practice, however, there has been some confusion, and the information has been regarded as based on trover and conversion, and not merely on detinue (*R.* v. *Jordan* (1587), 2 Leon. 34; *R.* v. *Maunsell* (1595), Co. Ent. 390; *Wilkinson* v. *Rocklas* (1672), 1 Mod. Rep. 90; *Nat* v. *Bartlett* (1710), Park. 278; *Kennett* v. *Lloyd* (1719), Bunb. 58; *R.* v. *Manning* (1739), 2 Com. 616). With these proceedings may be compared the Chancery proceedings for the recovery of treasure trove reported in *A.-G.* v. *Moore*, [1893] 1 Ch. 676, and *A.-G.* v. *British Museum* (*Trustees*), [1903] 2 Ch. 598.

(*g*) 3 Bl. Com. 261, 262; Manning, Exchequer Practice, 2nd ed., p. 142.

(*h*) *A.-G.* v. *Jones* (1863), 2 H. & C. 347 (sea-shore); *A.-G.* v. *Donaldson* (1842), 10 M. & W. 117, and *A.-G.* v. *Dakin* (1870), L. R. 4 H. L. 338 (royal

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defendants, or their interests must be properly represented (*i*). Persons not made defendants may appear and defend by leave, and defendants may limit their defence to part only of the property mentioned in the writ by a notice delivered within four days after appearance (*k*).

Pleading.

**6.** Where the Crown and those from or under whom the Crown claims, and all others claiming under the same title as that under which the Crown claims, have been out of possession or have not taken the profits of any hereditaments for the space of twenty years before the bringing of an information of intrusion to recover them, the defendants may plead the general issue and retain possession until the title has been tried and adjudged to the King (*l*). The fact of intrusion is not in issue at the trial, and a plea denying the Crown's right to actual possession is, except as to the putting in issue of the fact of the intrusion, equivalent to a plea of the general issue (*m*). The defendant may not plead double (*n*), and must set up a sufficient title in himself and not merely a title in a third party (*o*).

Where, however, the defendant has pleaded the general issue, and it turns out that the Crown has in fact been in possession or received the profits within twenty years, there will be judgment for the Crown, and the defendant cannot then set up his own title (*p*), except by leave of the court and on payment of all costs incurred by the Crown owing to his plea of the general issue (*q*). The statute of James, however, has no application where the Crown or its grantee has rightfully made a peaceable entry within twenty years and no information of intrusion has been filed (*r*). Where the statute of James does not apply and the defendant does not plead a sufficient legal title, the Crown ought to demur and not take issue upon the plea (*s*).

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palace); *A.-G. for the Isle of Man* v. *Mylchreest* (1879), 4 App. Cas. 294, P. C. (minerals); *A.-G.* v. *Butler* (1581), Sav. 4, pl. 10 (tithes); *A.-G.* v. *Gauntlett* (1829), 3 Y. & J. 93 (turf). For an instance of a similar information on behalf of the Duke of Cornwall, see *A.-G. to the Prince of Wales* v. *St. Aubyn* (1811), Wight. 167.

(*i*) *A.-G.* v. *Walsh* (1832), Hayes, 550; but see *Friend* v. *Richmond* (*Duke*) (1667), Hard. 460.

(*k*) Exchequer Rules, 1860, rr. 26, 28, 30.

(*l*) Stat. (1623) 21 Jac. 1, c. 14; see also *Doe* d. *Watt* v. *Morris* (1835), 2 Bing. (N. C.) 189; *A.-G.* v. *Parsons* (1836), 2 M. & W. 23; *A.-G.* v. *London Corporation* (1850), 2 Mac. & G. 247, 258. Apart from this statute, the Crown's title, as pleaded, was deemed to be of record, and the defendant could be put out of possession, without more, unless he also put on record by his pleading a title in himself (4 Co. Inst. 116; *A.-G.* v. *Hudson* (1565), 2 Dyer, 238 b; and see *A.-G.* v. *Butler* (1581), Sav. 4, pl. 10; *A.-G.* v. *Ware* (1584), Sav. 66, pl. 138).

(*m*) Exchequer Rules, 1860, r. 33.

(*n*) *A.-G.* v. *Allgood* (1743), Park. 1; *A.-G.* v. *Donaldson* (1842), 10 M. & W. 117, at p. 124. But the Attorney-General may consent to a double plea (*A.-G.* v. *Pack* (1661), Hard. 189). For pleading double generally, see title PLEADING.

(*o*) *A.-G.* v. *Hallett* (1847), 1 Exch. 211.

(*p*) *A.-G.* v. *D'Arcy* (1830), Hayes, 85; *A.-G.* v. *Ward* (1832), Hayes, 555 see also *A.-G.* v. *Mitchell* (1832), Hayes, 551.

(*q*) *A.-G.* v. *Langford* (*Lord*) (1838), 2 Jo. Ex. Ir. 619.

(*r*) *Emmerson* v. *Maddison*, [1906] A. C. 569, P. C.

(*s*) *A.-G.* v. *Hudson*, *supra*; *A.-G.* v. *Hallett*, *supra*.

Removing intruders.

**7.** The procedure for removing intruders is now separate and distinct from that to recover profits or damages for intrusion (*t*). The writ of *subpœna* must be directed to the defendants, as already described (*u*), by name, and must describe the property with reasonable certainty, and must direct appearance within fourteen days (*a*). It may be served in the ordinary way, or, if there be no occupant of the property, a copy may be affixed to the premises (*b*).

Judgment in default.

**8.** Judgment in default of appearance is given on an affidavit of service, or, if there has been no personal service, by order of the court or a judge, and judgment may be similarly given where there has been an appearance but the defence has been limited to part of the property only. Where there has been no appearance costs are not allowed on the judgment, but where a defendant, who has appeared, does not appear at the trial, judgment for the removal of persons intruding is given for the Crown with costs, without evidence being given of the Crown's title.

Nature of judgment.

**9.** The judgment for the Crown for the removal of persons intruding is a judgment of *amoveas*, and *capiatur pro fine*, if necessary (that is to say, that the intruder be removed from possession, and that he be taken by his body to make fine with the King for his intrusion); that for recovery of profits or damages is interlocutory, and, after inquiry as to damages, final judgment is given that the Crown do recover damages and costs, with a *capiatur pro fine*, if necessary (*b*).

Information of debt.

**10.** The information of debt is the King's action of debt (*c*). It is filed for the recovery by the Crown of penalties under the Acts relating to the Customs and Inland Revenue (*d*) or other Acts, or for sums due to the Crown under contract or otherwise (*e*).

Proceedings on informations for penalties are to be regarded rather as civil than as criminal proceedings (*f*). In the case of penalties under the Customs Acts persons jointly and severally indebted may be proceeded against jointly by one information or by several informations, and if they are proceeded against by joint information the penalties are recoverable against each (*g*).

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(*t*) Exchequer Rules, 1860, r. 21.

(*u*) See pp. 5, 6, *ante*.

(*a*) Exchequer Rules, 1860, rr. 22, 23. For forms of writ, see *ibid.*, Sched. A, Nos. 2, 3.

(*b*) *Ibid.*, rr. 29, 32, 34, 35, 36, 38. For forms of judgment see *ibid.*, Sched. B.

(*c*) *Cawthorne* v. *Campbell* (1790), 1 Anst. 205, n., at p. 214; *A.-G.* v. *Freer* (1822), 11 Price, 183, at p. 187.

(*d*) See title REVENUE.

(*e*) For precedents see Robertson, Civil Proceedings by and against the Crown, pp. 261 *et seq.* Where a penalty is created by statute and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, the Crown alone can sue for it (*Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354).

(*f*) *A.-G.* v. *Freer, supra*; *A.-G.* v. *Bradlaugh* (1885), 14 Q. B. D. 667, C. A. An appeal does not lie to the Court of Criminal Appeal (*R.* v. *Hausmann* (1909) —not yet reported).

(*g*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 222. As to the joinder of defendants and offences generally in informations for penalties, see *Gill* v. *A.-G.* (1662), Hard. 314; *R.* v. *Artillery Ground* (*Inhabitants*) (1754),

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SUB-SECT. 4.—*Practice.*

Practice on the Revenue side.

**11.** The practice in proceedings at law on the Revenue side of the King's Bench Division is not governed by the Rules of the Supreme Court, except in so far as those rules are specifically applied thereto (*h*). Apart from such specific application, the procedure is governed by the Crown Suits, &c. Act, 1865, Part III., the Exchequer Rules of 1860 and 1861, and the traditional practice of the King's Remembrancer's Department.

Commencement of proceedings.

**12.** Proceedings for the recovery of penalties under the Customs Acts in the High Court of Justice may be commenced either by writ of *subpœna*, or by writ of *capias* as the first process at the election of the Commissioners of Customs (*i*). All other informations, including those for penalties under the Acts relating to the Inland Revenue, are commenced by writ of *subpœna*.

Writ of *capias*.

**13.** The writ of *capias* is issued by the direction of the Attorney-General and on the fiat of a judge. The judge or the Commissioners of Customs fix the amount of the bail (*i*). On receipt of the writ the sheriff, who is indemnified for escape, issues a special warrant for the arrest of the person named in the writ (*k*) and returns it into the High Court. The defendant is discharged from custody on giving to the sheriff bail to the amount specified on the writ. He must then appear within fourteen days and give special bail to the Crown; otherwise judgment may be given against him on the filing of the information and the sheriff's return and execution issued within fourteen days after judgment (*l*). Before appearance he must submit the name of his sureties for approval to the solicitor of the department out of which the writ issued. If they are approved, he then has his bail piece made out, acknowledges it before a commissioner for oaths, files it, and enters his appearance. If they are not approved, the parties may justify before a judge, or, by order of a judge, before the King's Remembrancer, on two days' notice to the solicitor of the department, or the defendant may submit other sureties for approval (*m*).

Appearance.

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Park. 167; *A.-G.* v. *Freer* (1822), 11 Price, 183; *A.-G.* v. *Hughes* (1842), 11 L. J. (CH.) 329; *A.-G.* v. *Henley* (1858), 8 I. C. L. R. 267; *Ruck* v. *A.-G.* (1858), 3 H. & N. 208, Ex. Ch.

(*h*) Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59), s. 6, extends the power of making rules contained in the Judicature Acts to all proceedings by and against the Crown, but R. S. C., Ord. 68, r. 1, provides that the Rules of the Supreme Court shall not extend to proceedings on the Revenue side of the King's Bench Division, save as expressly provided. R. 2 of the same order applies the following orders to these proceedings:—Ord. 28 (amendment); Ord. 34 (special case); Ord. 38 (affidavits); Ord. 52 (motions); Ord. 58 (appeals); Ord. 64 (time); Ord. 65 (costs); Ord. 66 (notices etc.); Ord. 70 (non-compliance). R. 2A applies Ord. 2, r. 8 (testing of writs).

(*i*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 247. A writ of *subpœna* commands the defendant to appear before the King's Bench Division to answer matters to be alleged against him, under a penalty on default. A writ of *capias* directs the sheriff to take the defendant and bring him before the court. For form of writ, see Exchequer Rules, 1860, r. 10, and Sched. A, No. 4. The writ is in force for six months, renewable for a like period (*ibid.*, r. 10).

(*k*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 252, 253.

(*l*) Exchequer Rules, 1860, rr. 11, 12.

(*m*) *Ibid.*, rr. 17, 18; Commissioners for Oaths Act, 1889 (52 & 53 Vict.

Proceedings after appearance.

**14.** On appearance by the defendant in due time a copy of the information must be delivered to him or his solicitor, with notice to plead in fourteen days, otherwise judgment. But the defendant may appear at any time before judgment is actually signed on giving notice to the solicitor of the department. In this latter case, if the information has not been filed, he must be given a copy of it, with notice to plead as aforesaid; if the information has been filed, he may obtain a copy from the King's Remembrancer on payment, and must plead within four days (*n*). If he is in custody for want of bail, he may be served with a copy of the information personally or by delivery to the governor of the prison, and there will be judgment and execution if he does not appear and plead within twenty days. The copy in question is to be made by the solicitor of the department, and the information must be filed before service (*o*).

Extension of time may be obtained by the defendant from a judge on summons (*p*).

Discharge of defendant.

**15.** If the Crown does not take any effectual proceedings to bring the case to trial for three terms, a defendant who is under bail to appear and answer may obtain a discharge of his bail (*q*). Where the defendant is in custody on a *capias* or attachment for not appearing, the information, if not already filed, must be filed and served within six weeks after his arrest, or he may apply for his discharge on notice to the solicitor to the department (*r*).

Writ of *subpœna*.

**16.** The writ of *subpœna* is in force for six months, renewable for periods of six months, and concurrent writs may also be issued bearing the same date (*s*). Writs for service on, or notices of writ to, persons resident out of the United Kingdom, according as they are British subjects or aliens, may also be issued, and, if necessary, marked as concurrent with an ordinary writ of *subpœna* (*t*).

Service.

**17.** Service must, if practicable, be personal, but a judge may, on affidavit, give leave to dispense with personal service (*a*). In proceedings for penalties under the Customs Acts, however, if the Commissioners elect to proceed by *subpœna*, the writ may be served on the defendant personally, or it may be left at his last known place of abode or business anywhere in the United Kingdom or on board any vessel to which he belongs or has lately belonged (*b*). In Inland Revenue proceedings the writ may be served on the

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c. 10), s. 1. For form of bail piece, see Exchequer Rules, 1860, Sched. C, No. 10, which must be amended in accordance with the provisions of the last-cited Act.

(*n*) Exchequer Rules, 1860, rr. 13, 14.

(*o*) *Ibid.*, rr. 15, 16.

(*p*) *Ibid.*, r. 19.

(*q*) *A.-G.* v. *Bear* (1818), 6 Price, 83. As to the meaning of "effectual proceedings," see *A.-G.* v. *French* (1819), 7 Price, 557.

(*r*) Exchequer Rules, 1860, r. 41. The information need not be filed before the issue of the *capias* (*A.-G.* v. *Reilly* (1843), 12 M. & W. 217).

(*s*) Exchequer Rules, 1860, r. 2. A form is given *ibid.*, Sched. A, No. 1.

(*t*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), ss. 37—42. For the forms, see *ibid.*, Sched. II.

(*a*) Exchequer Rules, 1860, r. 3.

(*b*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 248.

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defendant in any part of the United Kingdom (*c*). Corporations may be served with the writ by delivery to their officers, without any necessity for a distringas (*d*).

Appearance.

**18.** Appearance must be entered within fourteen days after service, inclusive of the day of service, but the defendant may appear at any time before judgment is actually signed, on giving notice to the solicitor of the department issuing the writ (*e*).

If the defendant appears in due time, or after the due time but before the information is filed, a copy of the information must be delivered to him or his solicitor with notice to plead within fourteen days, otherwise judgment. If he appears after the due time, and after the information is filed, notice must be given to him or his solicitor of the date when the information was filed. He may then obtain an office copy thereof on payment, and must plead within four days (*f*).

Judgment in default.

**19.** On the defendant's failure to appear, judgment may be signed on filing the information, if not already filed, and an affidavit of service or order to proceed, and execution may be issued in fourteen days after judgment, where the claim is for a debt, penalty, or liquidated demand in money (*g*). If service has been effected out of the jurisdiction, the court, on proper evidence, may make an order to proceed, and the informant may have judgment on proving the merits of his claim (*h*). Where process is issued in the United Kingdom outside England in Inland Revenue proceedings, the High Court may transmit a certificate of the defendant's default to the part of the United Kingdom where the process was served, and the High Court there must take the proper steps against the defendant (*i*).

Information.

**20.** The information, when filed, must be on parchment, and must bear an indorsement of the date when process issued. It must be filed before or at the time when judgment is signed, but if judgment has been entered for the defendant, the copy delivered to him may be filed in lieu of the original information. It may be filed within twelve months after service or execution of process, except where the defendant is in custody on *capias* or attachment, in which case it must be filed within six weeks after his arrest (*k*).

The information is in the form of a declaration, as before the modern form of pleading was introduced. After giving the court to understand and be informed regarding the matters of claim, the Attorney-General prays the consideration of the court in the premises and judgment for the amount claimed (*l*).

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(*c*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 23 (1).
(*d*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 36; Exchequer Rules, 1860, r. 39.
(*e*) Exchequer Rules, 1860, rr. 4, 7.
(*f*) *Ibid.*, rr. 6, 8.
(*g*) *Ibid.*, r. 5.
(*h*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), ss. 37, 38.
(*i*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 23 (2).
(*k*) Exchequer Rules, 1860, rr. 40, 41.
(*l*) *Ibid.*, r. 64.

Pleading.

**21.** The plea to the information and subsequent pleadings must be delivered between the parties, and must be dated with the date of their delivery. The time for the plea and subsequent pleadings is in each case fourteen days, subject to extension by consent or by a judge's order, with judgment in default. The plea should give notice to the informant to reply within fourteen days, or such notice may be delivered separately (*m*).

The defendant is subject to the disabilities imposed by the prerogative of the Crown in the matter of pleading. He may not plead double (*n*), he must show title in himself (*o*), and he cannot counterclaim or set off (*p*), but he can, if he thinks fit, plead matter of equity (*q*).

Confession.

A defendant may confess the information, and in that case the confession as well as the information must be filed when judgment is signed; or he may plead and then withdraw his plea by delivery of such withdrawal to the solicitor of the department concerned, in which case the Crown files the withdrawal and may immediately enter judgment and issue process thereon (*r*).

Hearing.

**22.** The suit is set down for hearing by the Crown. Notice of trial, which must be given by the Crown, is ten days in all cases, and countermand of notice of trial must be given four days before the time mentioned in the notice of trial, unless short notice of trial has been given, when two days are sufficient (*s*). The trial is usually before a judge and special jury, and the associate in all cases at *nisi prius* is to take the verdict (*t*).

Witnesses.

**23.** Witnesses are summoned by subpœna from the King's Remembrancer's Department, and there is provision for the return of the depositions of witnesses to that department (*a*). Special provision is also made for the admission of documents (*b*).

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(*m*) Exchequer Rules, 1860, rr. 58, 59, 64.

(*n*) *A.-G.* v. *Snow* (1721), Bunb. 96; *R.* v. *York* (*Archbishop*) (1745), Barnes, 353; *R.* v. *Caldwell* (1801), For. 57.

(*o*) *R.* v. *Mason* (1702), 2 Salk. 447; *A.-G.* v. *Burridge* (1822), 10 Price, 350, at p. 370; *A.-G.* v. *British Museum* (*Trustees*), [1903] 2 Ch. 598.

(*p*) *Secretary of State for War* v. *Easdale* (1893), 27 I. L. T. 70; *R.* v. *Copland* (1799), Hughes, Report of *R.* v. *Bebb* (Appendix VIII.), 204, at p. 230; *R.* aux. *Lund* v. *Sherwood* (1816), 3 Price, 268.

(*q*) Stat. (1542) 33 Hen. 8, c. 39, s. 55; *Cecil's* (*Sir Thomas*) *Case* (1597), 7 Co. Rep. 18 b, 19 a; *Trallop's Case* (1609), Lane, 51; *Hix* v. *A.-G.* (1661), Hard. 176; *Savile* v. *Queen Mother* (1668), Hard. 502.

(*r*) Exchequer Rules, 1860, rr. 79, 80.

(*s*) *Ibid.*, r. 74.

(*t*) *Ibid.*, r. 74. As to the jury, *ibid.*, r. 75, applies ss. 104—115 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and the Rules of Hilary Term, 1853, rr. 44—49.

(*a*) Exchequer Rules, 1860, r. 78. Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 34, applies the Evidence Act, 1851 (14 & 15 Vict. c. 99), ss. 2, 3, and the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), to these proceedings, and provides that they shall not be deemed criminal proceedings for the purpose of those provisions. As to affidavits, see R. S. C., Ord. 38, applied by Ord. 68, r. 2, and Exchequer Rules, 1860, rr. 118—122.

(*b*) Exchequer Rules, 1860, r. 76, applies the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 117—119, and the Rules of Hilary Term, 1853,

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**24.** The procedure with regard to special cases follows the ordinary course, save that they are filed and set down for hearing in the King's Remembrancer's Department (*c*).

Judgment after trial.

**25.** Judgments after trial at *nisi prius* are entered in accordance with the associate's certificate, and judgments in general are to be in the prescribed forms (*d*). They are entered in the King's Remembrancer's Department. All judgments after trials at *nisi prius* or at bar may be signed and execution issued thereon in fourteen days, unless the court or a judge orders execution to issue at an earlier or later period with or without terms (*e*).

Costs.

**26.** Costs may be given to and against the Crown (*f*). They follow the event, unless it is otherwise specially ordered (*g*), and are taxed by a taxing master. When costs are awarded to the Crown the taxing master gives a certificate, and a subpœna for costs may be taken out and followed by attachment on demand and non-payment, or a separate writ of execution may issue for the costs (*h*).

Appeal.

**27.** An appeal is brought and prosecuted in the usual manner (*i*). A new trial is applied for in the manner which obtained before the Judicature Acts (*k*). An appeal operates as a stay of execution on proper security for costs being given (*l*).

Writ of appraisement.

**28.** A writ of appraisement is issued as of course after the exhibition of an information of seizure by an officer who has seized goods under the Acts relating to customs and excise for the purpose of obtaining the condemnation of such goods. It is directed to commissioners, who are commanded to cause the goods to be valued and appraised by good and lawful men on oath, to execute an indenture of appraisement between themselves and such appraisers, and to return one part thereof with the writ into the High Court on a certain date. On the return the writ and indenture are filed in the King's Remembrancer's Department, together with the information

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rr. 29, 30. These last-mentioned rules were repealed by R. S. C., Appendix O, but see Order 72, r. 2.

(*c*) Exchequer Rules, 1860, rr. 135, 136; R. S. C., Ord. 34, applied by Ord. 68, r. 2.

(*d*) Exchequer Rules, 1860, r. 89; for the forms see *ibid.*, Sched. B.

(*e*) *Ibid.*, r. 88. As to judgment and execution in default, see pp. 7, 10, *ante*.

(*f*) Crown Suits Act, 1855 (18 & 19 Vict. c. 90), ss. 1, 2; Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 21. R. S. C., Ord. 65, as to costs, is applied, so far as applicable, by Ord. 68, r. 2.

(*g*) *A.-G.* v. *Blucher de Wahlstatt* (*Countess*) (1864), 3 H. & C. 374, at p. 391. As to costs where an information was only successful in part, see *A.-G.* v. *Shillibeer* (1849), 6 Exch. 606; as to costs in a case of joint defendants, see *A.-G.* v. *Roberts* (1855), 4 W. R. 7.

(*h*) Exchequer Rules, 1860, rr. 86, 96, as amended by R. S. C., January, 1902.

(*i*) R. S. C., Ord. 58, applied by Ord. 68, r. 2. It is not clear whether the time for appealing from a judgment on an information is fourteen days or three months.

(*k*) Namely, under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 31, 34, 35, 44, applied by the Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), ss. 31, 35, and under the Exchequer Rules, 1860, rr. 108, 109.

(*l*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 32, which appears not to be superseded by R. S. C., Ord. 58, r. 16.

of seizure (*m*). Should no claim be entered within eight days, if the return of the writ has expired, or, if it has not expired, within eight days after its expiry, or should only a part of the property have been claimed, a judgment of recovery may be entered and a writ of delivery issued for the disposal of the property mentioned in the indenture, or the unclaimed part thereof, as the case may be, without any rule to claim (*n*).

Claims.

**29.** If a claim is made, it must be entered at the King's Remembrancer's Department and there entered on the record and in the claim book (*o*). It may be entered at any time before process issued or order obtained for realising the property. The claimant has eight days after the entering of his claim to make an affidavit of property and, if the proceedings are under the Inland Revenue Acts, to enter into a recognisance for costs; and, in default, judgment may be signed as if no claim had been entered (*p*).

The claim must be entered in the real name of the owner or proprietor of the property and describe his place of residence and occupation (*q*). If the proprietors are more than five in number, the claim, where the proceedings are under the Customs Acts, may be made by any two of them, or, in the case of a company or partnership, by the public officer of the company or by an agent for the partners or by one of them (*r*).

Information for condemnation.

**30.** An information for the condemnation of the property is then filed and delivered to the claimant or his solicitor, with a notice indorsed upon it requiring him to plead within fourteen days, otherwise judgment. It has been said that the plea ought to deny the several causes of forfeiture alleged, but it would appear that a general denial is sufficient (*a*). The proceedings then follow the course of other proceedings on Latin informations, but the writ and indenture need not form part of the record of *nisi prius* (*b*).

In proceedings under the Inland Revenue Acts, the fact, form, and manner of the seizure are taken to have been as set forth in the information without any evidence thereof (*c*). There are also special provisions for the delivery-up of animals and perishable goods to the claimant on payment of, or giving of security for, their appraised value (*d*).

Writ of delivery.

**31.** If judgment is given for the Crown, the condemnation of the goods is enforced by a writ of delivery, addressed to the officer who

(*m*) Exchequer Rules, 1860, r. 51.
(*n*) *Ibid.*, rr. 51, 106.
(*o*) *Ibid.*, rr. 106, 107.
(*p*) *Ibid.*, rr. 52, 53; Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 264; Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 25 (2). For a form of recognisance, see Exchequer Rules, 1860, Sched. C, No. 12.
(*q*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 264; Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 25 (1).
(*r*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 265, 266. Nothing is said in the Act or elsewhere as to the manner in which a claim is to be made by a company which has no public officer.
(*a*) Manning, Exchequer Practice, 2nd ed., 175, 219.
(*b*) Exchequer Rules, 1860, r. 52.
(*c*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c 21), s. 25 (3).
(*d*) *Ibid.*, s. 26.

SECT. 1. Latin Informations.

made the seizure and ordering him to deliver the property to the Commissioners of Customs or Inland Revenue, as the case may be. If judgment is given for the claimant, the judge may certify that there was reasonable and probable cause for the seizure, and this certificate may be pleaded in bar to any proceeding against the seizor (*e*).

## SECT. 2.—*Extents.*

### SUB-SECT. 1.—*Nature of Writ of Extent.*

Writ of extent.

**32.** The writ of extent is the process by which the Crown can seize the body, lands, goods, and debts or other choses in action of its debtor by summary process for the purpose of obtaining satisfaction of debts due to it. If the Crown debt is of record, the extent issues immediately upon the record; if the debt is not of record, a commission to find the debt and make it of record is necessary, except in the case of immediate extents (*f*).

Species of extent.

**33.** Extents are divided into extents in chief and extents in aid. Extents in chief are extents issued on behalf of the Crown against its debtor (extents in chief in the first degree), or against its debtor's debtor, and so on (extents in chief in the second, third etc. degrees). Any of the species, again, may be either ordinary or immediate. An immediate extent is issued on an affidavit that a debt is due to the Crown, and that it is in danger of being lost unless an extent is issued. An extent in aid is an extent employed by the Crown debtor to recover a debt from his debtor in aid of the Crown's claim (*g*).

### SUB-SECT. 2.—*Immediate Extents in Chief in the First Degree.*

Affidavit of debt and danger.

**34.** The affidavit of debt and danger, which is indispensable to the issue of a writ of immediate extent, states the existence of the Crown debt and that it will be lost unless a method more speedy than the ordinary method be taken to recover it (*h*). Where the debt is a bond debt, the bond is produced at the same time as the affidavit, which must state the breach of the condition (*i*).

Fiat.

A judge of the King's Bench Division in chambers, on production of the affidavit and, if the debt be by bond, the bond, signs his fiat at the foot of the affidavit.

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(*e*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 267; Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 29 (1).

(*f*) The commission to find debts in the case of immediate extents was abolished by the Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 47. It is usual to obtain the Attorney-General's authority before the application is made, but this is not necessary. For a form of authority, see Robertson, Civil Proceedings by and against the Crown, 271.

(*g*) Extents in chief are now comparatively rare; they were formerly the Crown's favourite method of recovering its debts. Extents in aid were practically abolished by the Extents in Aid Act, 1817 (57 Geo. 3, c. 117), see p. 18, *post*. The only species which it is worth while to discuss at length at the present day is the immediate extent in chief in the first degree.

(*h*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 47.

(*i*) *R.* v. *Moseley* (1668), West, Law of Extents, 325; *R.* aux. *Ricketts* v. *Sly* (1816), 2 Price, 157; *R.* v. *Marsh* (1824), 13 Price, 826.

Issue of writ.

**35.** The writ then issues to the sheriff from the King's Remembrancer's Department. If it issues within twenty-one days of the fiat, it may bear *teste* of the date of the fiat (*k*). Any number of writs into different counties in respect of the same debt may be issued under the same fiat until the return under the first writ has been made. After that there must be a fresh application supported by affidavit (*l*). An irregularity in a writ, if it does not affect the fiat, may be cured by the issue of a new extent tested as of the same date. The death of the defendant after fiat but before writ does not prevent its issue, and his death after issue does not abate the writ (*m*).

Inquisition.

**36.** The inquisition as to the debtor's property, which the writ orders the sheriff to hold, is held in a manner similar to that which is adopted for an inquisition of escheat (*n*). The debtor is given notice and is examined, and the Crown, the debtor and other persons interested take part in the proceedings and call evidence. The inquisition ought to find what property the debtor possesses in the county, and any special facts concerning its nature or tenure (such as, in the case of debts, details with regard to the person indebted), its value, and a statement that the property has been seized into the King's hands (*o*). If the return is defective or finds against the King, a *melius inquirendum* may be ordered, or a supplemental inquisition may be taken (*p*).

What may be seized.

**37.** Body, goods and chattels, lands and tenements, debts, credits, specialties and sums of money of the debtor in the county are ordered to be seized by the writ, and apparently they can all be seized at once, whatever the amount of the debt (*q*). Under an extent in chief the sheriff may seize goods already found under an extent in aid, which is prior in date, if the latter has not been fully executed (*r*). Extents in chief take rank according to priority of date.

Debtor's body.

It is usual for the Crown to intimate to the sheriff that he is not to seize the debtor's body until he receives special directions to do so (*s*).

Goods and chattels.

Goods and chattels which were the absolute property of the

(*k*) Exchequer Rules, 1860, rr. 1, 48.

(*l*) *R.* v. *Gibson* (1743), Park. 35; *R.* v. *Buchanan* (1754), Park. 176.

(*m*) *R.* v. *Wade* (1818), 5 Price, 621.

(*n*) See p. 35, *post*.

(*o*) For forms of return, inquisition and supplemental inquisition, see Robertson, Civil Proceedings by and against the Crown, 273—275.

(*p*) It has been said that the King must be content with one *melius inquirendum* (*Stoughter's* (*Paris*) *Case* (1610), 8 Co. Rep. 168 a). As to the effect of the two inquisitions *inter se*, see *Anon.* (1570), 3 Dyer, 292 a, pl. 71; *Inche* v. *Roll* (1615), Hob. 50; *Layton* v. *Manlove* (1690), 2 Salk. 469; *Ex parte Duplessis* (1754), 2 Ves. Sen. 538. Where a creditor had assigned all his property for the benefit of his creditors, and the return was *nulla bona*, a fresh inquisition was ordered to find the fact of the assignment (*R.* v. *Jobling* (1849), 4 Exch. 483).

(*q*) See Robertson, Civil Proceedings by and against the Crown, 193, 194.

(*r*) *R.* v. *Quash* (1713), Park. 281; *R.* v. *Bowdage* (1717), Park. 282.

(*s*) See Robertson, Civil Proceedings by and against the Crown, 194, where the unreported case of *R.* v. *Cowing* (1877) is referred to, the last instance in which a debtor's body was seized.

SECT. 2. Extents.

debtor at the date of the extent may be seized (*t*). The inquisition ought also to return goods which any other person has to the use of or in trust for the debtor, and it is well that it should also find, in a proper case, any special property which any person has in the goods seized. Otherwise a person setting up a claim to such goods is put to his traverse (*a*). Where an extent is against joint debtors, the joint and several goods of each may be taken. Partnership goods may be seized under an extent against one partner, but the Crown may only sell the defendant's share of the assets which remain after payment of debts (*b*). Goods in the hands of the debtor as executor cannot be seized, except, perhaps, where he has treated them as his own (*c*).

**Land.** Lands of which the debtor is *cestui que trust* (*d*), or (subject to the mortgage) of which he has an equity of redemption (*e*), or which he has agreed to sell (*f*), leaseholds (*g*), and rents service or rent-charges (*h*), are extendible, but not copyholds (*i*).

**Choses in action.** Debts and choses in action of the debtor cannot be assigned after the date of the extent, so that the assignment binds the Crown, but the debtor may discharge them, or he may be sued by the creditor, after that date (*k*). The Crown can seize choses in action, even if not matured, though it cannot sue on them (*l*).

**Money.** It would appear also that money *bonâ fide* disposed of between extent and inquisition may be seized by the Crown, if it can be found (*m*).

**Realisation.** **38.** The Crown may proceed to realise the property seized eight days after the return has been filed, if the time for return has expired, or, if it has not expired, eight days after the expiry of such time, but if a debt has been returned and there is danger of its being lost, an extent may issue to recover it before the expiry of such eight days (*n*). A special procedure is provided for the sale of lands taken under extents and for conveyance by the King's

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(*t*) West, Law of Extents, 97.

(*a*) *A.-G.* v. *Trueman* (1843), 11 M. & W. 694.

(*b*) *R.* v. *Sanderson* (1810), Wight. 51; *Spears* v. *Lord Advocate* (1839), 6 Cl. & Fin. 180, H. L.

(*c*) *Buckler* v. *Rogers* (1622), 2 Roll. Abr. 159; *Quick* v. *Staines* (1798), 1 Bos. & P. 293.

(*d*) *De Chirton's* (*Walter*) *Case* (1558), 2 Dyer, 160 a; *Coke's* (*Sir Edward*) *Case*, (1624), Godb. 289; *A.-G.* v. *Sands* (1668), Hard. 488, at p. 495.

(*e*) *R.* v. *De la Motte* (1801), For. 162; *R.* v. *Coombes* (1814), 1 Price, 207.

(*f*) *R.* v. *Snow* (1804), 1 Price, 220, n.

(*g*) *Fleetwood's* (*Sir Gerrard*) *Case* (1610), 8 Co. Rep. 171 a.

(*h*) *Lillingston's Case* (1607), 7 Co. Rep. 38 a.

(*i*) *R.* v. *Lisle* (*Lord*) (1625), cited Park. 195.

(*k*) *Lakeman* v. *M'Adam* (1820), 8 Price, 576. The older authorities are in conflict whether debts are bound, like goods, from the date of the extent or only from the date of the caption of the inquisition (see *R.* v. *Arnold* (1710), 7 Vin. Abr. 104, tit. Creditor and Bankrupt (Z); *A.-G.* v. *Elwell* (1725), Bunb. 199; *R.* v. *Green* (1729), Bunb. 265; *R.* aux. *Cox* v. *Glenny* (1816), 2 Price, 396; West, Law of Extents, 162 *et seq.*

(*l*) *R.* v. *Chapman* (1632), Hughes, Report of *R.* v. *Bebb*, 118; *R.* v. *Brace* (1633), *ibid.* 119. See also title CHOSES IN ACTION, Vol. IV., p. 359.

(*m*) Robertson, Civil Proceedings by and against the Crown, 198; but see *contra*, West, Law of Extents, 172; Manning, Exchequer Practice, 2nd ed., 55.

(*n*) Exchequer Rules, 1860, r. 48.

Remembrancer (*o*). A *venditioni exponas* of goods may be issued without a motion in court, and the goods are sold under it, usually by auction (*p*).

Setting aside extent.

**39.** The defendant may move to set aside an extent, on affidavit showing some defect apparent on the face of the proceedings or some irregularity in the execution of the writ (*q*). The motion must be made as soon as the defendant is aware of the ground of objection (*r*), and in most cases before his appearance and claim (*s*).

When the debt has been discharged at any stage, the court orders an *amoveas manus* (*t*).

Claims.

**40.** If any person claims the property seized, he must enter a memorandum of appearance and claim, giving notice to the solicitor of the Government department who is in charge of the matter (*a*). The claim may be entered at any time before process issued or order obtained for realising the property returned, and, if part only is claimed, the remainder may be dealt with as if there had been no claim (*b*). The solicitor to the Government department then gives the claimant notice to plead within fourteen days, otherwise judgment. The time may be extended by the court. The pleadings are to be delivered as in other proceedings on the Revenue side of the King's Bench Division (*c*).

SUB-SECT. 3.—*Extents in Chief in the Second and Subsequent Degrees.*

Extent against remoter debtors.

**41.** The Crown can proceed with an extent against its debtor's debtor and so on, to any number of degrees (*d*), before it has sought to realise its debt out of the property of its debtor which has been returned (*e*). The practice is similar to that on extents in the first degree, except that the first inquisition is produced to the judge in chambers with an affidavit that the proposed extendee was found

(*o*) Under the Crown Debtors Act, 1785 (25 Geo. 3, c. 35). See *R.* v. *Coombes* (1814), 1 Price, 207; *R.* aux. *Hutton* v. *Hopper* (1816), West, Law of Extents, 225; *R.* v. *Bulkeley* (1827), 1 Y. & J. 256; *R.* v. *Rawlings* (1835), 2 Cr. M. & R. 471; *R.* v. *Lane* (1840), 6 M. & W. 489; *R.* v. *De la Motte* (1857), 2 H. & N. 589.

(*p*) West, Law of Extents, 219, 220; Manning, Exchequer Practice, 2nd ed., 63; *R.* v. *Burns* (1827), 1 Y. & J. 579; *R.* v. *Marsh* (1831), 1 Cr. & J. 406.

(*q*) Manning, Exchequer Practice, 2nd ed., 112 *et seq.*; see also *R.* v. *Scott* (1816), West, Law of Extents, 180; *R.* v. *Lawton* (1817), *ibid.*

(*r*) *Hodge* v. *Borroden* (1818), Manning, Exchequer Practice, 2nd ed., 114.

(*s*) *R.* v. *Mann* (1727), 2 Stra. 749, at pp. 759, 760; *R.* v. *Pearson* (1816), 3 Price, 288, at pp. 290, 291; *R.* v. *Collingridge* (1816), West, Law of Extents, 184, and see *R.* aux. *Horn* v. *Scott* (1816), West, Law of Extents, 184; *R.* v. *Scott* (1817), 4 Price, 181.

(*t*) *R.* aux. *Simpson* v. *Hopper* (1816), 3 Price, 40. For forms to be used in such a case, see Robertson, Civil Proceedings by and against the Crown, 278.

(*a*) Exchequer Rules, 1860, r. 49.

(*b*) *Ibid.*, rr. 106, 107.

(*c*) *Ibid.*, rr. 49, 50. The course of pleading is similar to that on an inquisition of escheat; see p. 37, *post*. Where a third party pleads, he must set up a title in himself, whether an absolute title or a title to a lien or otherwise (*R.* v. *Soulby* (1827), 1 Y. & J. 249; *A.-G.* v. *Trueman* (1843), 11 M. & W. 694).

(*d*) *A.-G.* v. *Poultney* (1665), Hard. 403.

(*e*) *R.* v. *Larking* (1820), 8 Price, 683.

SECT. 2. Extents.

indebted under the inquisition, and, if an immediate extent is desired, that there is danger of the debt being lost (*f*). The defendant, after return, may plead that no debt was due from the primary debtor to the Crown or that he was not indebted to the primary debtor (*g*).

SUB-SECT. 4.—*Extent in Aid.*

Extent in aid.

**42.** The extent in aid, after many years of misuse by debtors who utilised the process as a ready remedy for the recovery of their own debts, having constituted themselves for the purpose, or being in fact, Crown debtors, was ultimately reduced to its legitimate purpose and thereby became practically extinct (*h*). In any event, a Crown debtor cannot use the prerogative process against his debtor after his own debt to the Crown has been discharged (*i*). The practice is to grant the extent *pro formâ*, on affidavit made by the Crown debtor, and, on the return being made thereto, application is made for the extent in aid in a manner similar to that employed in the case of an extent in chief (*k*).

SECT. 3.—*Diem Clausit Extremum.*

Writ of *diem clausit extremum.*

**43.** The writ of *diem clausit extremum* is the equivalent of a writ of extent tested after the death of a Crown debtor. A commission to find the debt, where the debt is not of record, is no longer necessary (*l*). The writ is issued on an affidavit of debt and death, showing, that is to say, that the person concerned owed a debt to the Crown and died owing such debt. Subject to this the practice follows generally that on extents in chief (*m*).

SECT. 4.—*Scire Facias.*

Writ of *scire facias.*

**44.** *Scire facias* on the Revenue side of the King's Bench Division is the correct process for the recovery of Crown debts of record, of whatever kind (*n*). The writ, which is founded on

(*f*) The extent can be issued immediately on a return being made under an extent or *diem clausit extremum* that a debt is owing to the Crown's debtor (Exchequer Rules, 1860, r. 48).

(*g*) West, Law of Extents, 248, 249.

(*h*) By the Extents in Aid Act, 1817 (57 Geo. 3, c. 117). This Act limits the amount which might be recovered by this means by the Crown debtor from his debtor to the sum which was actually due from himself to the Crown, and also excludes from the opportunity of using the process nearly all simple contract debtors and certain classes of bond debtors of the Crown.

(*i*) *R.* aux. *Hollis* v. *Bingham* (1831), 2 Cr. & J. 130.

(*k*) For forms of affidavit, see West, Law of Extents, 275 *et seq.* As to the evidence required on the first inquisition, see *R.* v. *Ryle* (1841), 9 M. & W. 227, disapproving *R.* aux. *Hill* v. *Hornblower* (1822), 11 Price, 29.

(*l*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 47. Therefore it now makes no difference whether the debt was of record in the deceased's lifetime or not, nor, in the case of debtors in the second and third degree, whether the debt was found by inquisition in the debtor's lifetime or not.

(*m*) *R.* v. *Manning* (1739), 2 Com. 616; *R.* v. *Hassell* (1824), 13 Price, 279; *R.* v. *Crewe* (*Lord*) (1836), 5 Dowl. 158. For the practice on extents in chief see pp. 14 *et seq.*, *ante;* for a form of writ, see Robertson, Civil Proceedings by and against the Crown, 280.

(*n*) *R.* v. *Bingham* (1829), 3 Y. & J. 101, and *R.* v. *Bayly* (1841), 1 Dr. & War. 213 (on recognisances); *Yale* v. *R.* (1721), 6 Bro. Parl. Cas. 27; *R.* v.

SECT. 4. Scire Facias.

the record, requires the defendant to appear in the King's Bench Division to answer the Crown's claim. It is in force for six months, but is renewable, and is to be served, if possible, personally. Appearance must be entered in fourteen days, inclusive of the day of service, and the defendant, if appearing within due time, must plead to the writ within fourteen days after appearance. If he does not appear, judgment may be signed, on an affidavit of service, and execution issued in fourteen days from the day of signing judgment. The *scire facias* must in all cases be filed before judgment is signed (*o*).

Pleading.

The defendant pleads directly to the writ. He may plead in abatement or in bar, or demur. If he alleges that there has been no breach of the condition, in the case of a bond, he will plead to that effect (*p*). Where the *scire facias* is on an inquisition, the defendant may plead to it without traversing the inquisition (*q*).

### SECT. 5.—*Summary Proceedings for the Recovery of Duties.*

Summary recovery of duties.

**45.** Any person accountable or chargeable with duty under the Succession Duty Acts or the Legacy Duty Acts, who is required by the Commissioners of Inland Revenue to deliver an account, and who makes default in doing so, may be ordered by a writ of summons sued out by the Commissioners on the Revenue side of the King's Bench Division to deliver such account, or to show cause why he should not do so. A similar process may be followed where an assessment has been made of succession or legacy duty and it has not been paid, or where a person has administered any part of the personal estate of any person deceased without obtaining probate or letters of administration within six months of the decease, or within two months after the termination of any suit or dispute regarding the probate or administration, unless such suit or dispute has terminated within four months after the decease (*r*). The

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*M'Leod* (1816), 3 Price, 203; *R.* v. *Ellis* (1816), 3 Price, 323; *A.-G.* v. *Winstanley* (1831), 2 Dow & Cl. 302, H. L., and *R.* v. *Chambers* (1843), 11 M. & W. 776 (on bonds); *A.-G.* v. *Newman* (1815), 1 Price, 438, and *R.* v. *Morrall* (1818), 6 Price, 24 (on inquisitions). As to *scire facias* on contracts for the redemption of land tax, see Land Tax Redemption Act, 1813 (53 Geo. 3, c. 123), Sched. E (3). The fiat of the Attorney-General is required where a lunacy bond is put in suit by a solicitor other than the solicitor of a Government department. For *scire facias* on the Crown side, see p. 35, *post*.

(*o*) Exchequer Rules, 1860, rr. 42—47. For forms of writ see *ibid.*, Sched. A, Nos. 5—9. As to the method of proceeding in the case of joint and several bonds, see *Eccleston* v. *Clipsham* (1668), 1 Wms. Saund. 153; *R.* v. *Chapman* (1796), 3 Anst. 811; *R.* v. *Young* (1794), 2 Anst. 448.

(*p*) *R.* v. *Wiblin* (1825), 2 C. & P. 10.

(*q*) *Anon.* (1519), Keil. 200 b, pl. 15. As to pleading, see, generally, Manning, Exchequer Practice, 2nd ed., 139 *et seq.*; and for forms, see Robertson, Civil Proceedings by and against the Crown, 281. A plea of payment after day but before writ issued, and acceptance by the Crown in satisfaction, is not sufficient (*R.* v. *Ellis* (1814), 1 Price, 23; and see *R.* v. *Bayly* (1841), 1 Dr. & War. 213, 217).

(*r*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), ss. 55—57. For forms of writs see *ibid.*, Sched. IV., and Exchequer Rules, 1860, Sched. A, No. 12, as amended by Exchequer Rules, 1861. For appeals as to corporation duty, excise duties, and stamp duties, see title REVENUE; as to estate and succession duties, title ESTATE AND OTHER DEATH DUTIES; as to income tax,

SECT. 5. Summary Proceedings for the Recovery of Duties.

procedure also applies to the recovery of estate duty (*s*) and the duty on the property of bodies corporate and unincorporate (*t*).

The writs are to be in force for six months, renewable by re-sealing as a writ of *subpœna* (*u*). The respondent shows cause by filing an affidavit in the King's Remembrancer's Department, setting out the reasons for his non-compliance, and sets down the cause for hearing (*a*).

The court may, if it thinks fit, refer the matter to the proper officer for report and order his report to be stated as a special case, and may order the production of any documents and direct any issues to be tried by a jury (*b*). Appeals from the decisions of the court may be brought on notice in writing within four days and on giving proper bail (*c*).

If the respondent does not appear, or appears and does not show cause, he may be attached, on motion on behalf of the Commissioners (*d*).

In other respects the practice is similar to that on proceedings commenced by a writ of *subpœna* (*e*).

## SECT. 6.—*English Informations.*

### SUB-SECT. 1.—*Nature and Object of English Informations.*

English informations.

**46.** The English information, or information in equity, on the Revenue side of the King's Bench Division, is a valuable instrument at the disposal of the Crown or the Duke of Cornwall for the assertion of rights to hereditaments, particularly in cases where the title is ancient and obscure, and for the obtaining of an account and payment from defaulting officers or other persons or corporations (*f*). Where a plaintiff is joined with the Attorney-

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title INCOME TAX; inhabited house duty, title INHABITED HOUSE DUTY; land tax, title LAND TAX; and as to compensation under the Licensing Act, 1904 (4 Edw. 7, c. 23), title INTOXICATING LIQUORS.

(*s*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8.

(*t*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 19 (1).

(*u*) Exchequer Rules, 1860, r. 127, and Rule of 26th November, 1861.

(*a*) Annual Practice, 1909, Vol. II., p. 956.

(*b*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 58; and see also R. S. C., Ord. 34, applied by Ord. 68, r. 2.

(*c*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), ss. 59, 61; and see also R. S. C., Ord. 85, applied by Ord. 68, r. 2.

(*d*) The practice on motions for attachment is governed by R. S. C., Ord. 52, applied by Ord. 68, r. 2, except that the King's Remembrancer's Department deals with the formal parts of the procedure. See also *Re Higgs* (1888), 5 T. L. R. 25.

(*e*) See p. 9, *ante*.

(*f*) The procedure is valuable to the Crown or Duchy of Cornwall, because, by its peculiar nature, which resembles that of the old equity bill, it forces the defendant to disclose his title or his case by means of interrogatories administered at the same time as the information is delivered and embodying substantially the allegations contained in the information. By a judicious amendment of the information after the answers to the first set of interrogatories have been filed, the Crown can administer a fresh set, and so on, until the defendant's case is entirely disclosed. On occasions this practice has been carried to inordinate and oppressive lengths (see the strong criticism in *A.-G. to the Prince of Wales* v. *St. Aubyn* (1811), Wight. 167, 184, 216, 223). Indeed, the

SECT. 6. English Informations.

General or with the Attorney-General of the Prince of Wales the proceeding is known as an information and bill. The Attorney-General of the Duchy of Lancaster cannot file an information in the High Court (*g*).

English informations have been used for the recovery of foreshore (*h*), for the recovery of other hereditaments, corporeal or incorporeal (*i*), and for the recovery of money debts, where discovery and an account have been desired (*k*). Proceedings under the Marriage Acts (*l*) on the relation of a parent or guardian for forfeiture of an estate accruing to a person by an improper marriage may also be taken by English information (*m*).

SUB-SECT. 2.—*Practice.*

Practice.

**47.** The practice on English informations is only subject to the Judicature Acts in so far as the rules made thereunder are specifically applied to it (*n*). Apart from such special application the practice is governed by Part II. of the Crown Suits, &c. Act, 1865, the Exchequer Rules, 1865 and 1866, and the traditional procedure of the King's Remembrancer's Department.

Information.

**48.** The proceedings are not commenced by writ, but by the filing of the information or information and bill, which must be

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Crown seems to have originally adopted this procedure owing to its desire to avoid trial by jury and to prevent the defendant from pleading the general issue and retaining possession under stat. 21 Jac. 1, c. 14 (see p. 6, *ante*), as he could have done, if it had proceeded by an information of intrusion. See, generally, Robertson, Civil Proceedings by and against the Crown, 234.

(*g*) *A.-G. of the Duchy of Lancaster* v. *Devonshire* (*Duke*) (1884), 14 Q. B. D. 195.

(*h*) *A.-G.* v. *Constable* (1879), 4 Ex. D. 172; *A.-G.* v. *Williamson* (1889), 60 L. T. 930; *A.-G.* v. *Emerson*, [1891] A. C. 649; *A.-G.* v. *Newcastle-upon-Tyne Corporation*, [1899] 2 Q. B. 478, C. A., and many other cases. The Crown has also proceeded by information of intrusion, as in *A.-G.* v. *Jones* (1863), 2 H. & C. 347, or by suit in Chancery, as in *A.-G.* v. *Tomline* (1880), 14 Ch. D. 58, C. A.

(*i*) *A.-G.* v. *Stawell* (*Lord*) (1795), 2 Anst. 592, and *A.-G.* v. *Hallett* (1847), 16 M. & W. 569 (waste in a royal forest); *A.-G.* v. *Sitwell* (1835), 1 Y. & C. (EX.) 559; *A.-G.* v. *Lambe* (1838), 3 Y. & C. (EX.) 162; *A.-G.* v. *Reveley* (1869), Karslake's Rep.; *A.-G.* v *Barker* (1872), L. R. 7 Exch. 177 (manorial rights); *A.-G.* v. *Vincent* (1724), Bunb. 192 (copyholds); *A.-G.* v. *Eardley* (*Lord*) (1820), 8 Price, 39 (tithes). For Chancery proceedings for similar purposes, see *A.-G.* v. *Mathias* (1858), 4 K. & J. 579, and *A.-G.* v. *Tomline* (1877), 5 Ch. D. 750 (minerals).

(*k*) *Great Western Rail. Co.* v. *A.-G.* (1866), L. R. 1 H. L. 1, and *A.-G.* v. *Metropolitan Rail. Co.* (1880), 5 Ex. D. 218, C. A. (railway passenger duty); *A.-G.* v. *Richmond*, (*Duke*) (No. 2), [1907] 2 K. B. 940, and many other cases (death and other duties); *A.-G.* v. *Evans* (1862), 5 L. T. 760 (fee farm rents). For Chancery proceedings for a similar purpose, see *A.-G.* v. *Edmunds* (1868), L. R. 6 Eq. 381. Unreported examples are given by Robertson, Civil Proceedings by and against the Crown, 239.

(*l*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 23; Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 19; Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 14. As to these, see title HUSBAND AND WIFE.

(*m*) The same Acts, however, provide that proceedings may be taken in Chancery, and this is the usual course.

(*n*) R. S. C., Ord. 68, r. 1. *Ibid.*, rr. 2 and 2A apply certain orders to all proceedings on the Revenue side of the King's Bench Division, both at law and in equity (see note (*h*) on p. 8, *ante*).

SECT. 6. English Informations.

printed, in the King's Remembrancer's Department (*o*). In the information or information and bill the informant gives the court to understand and be informed of the facts alleged on behalf of the Crown, and prays such relief as the Crown desires, together with an account, discovery, an injunction, and such other ancillary relief as the informant thinks fit (*p*).

A copy of the information is marked with the date of filing and sealed in the King's Remembrancer's Department, and bears an indorsement commanding the defendant to enter an appearance within eight days after service on pain of having an appearance entered for him and of being arrested and imprisoned and of having a decree made against him in his absence (*q*). The copy of the information so indorsed is served on the defendant, if within the jurisdiction, in the same manner as a writ of *subpœna* (*r*). Provision is also made for service out of the jurisdiction (*s*).

Appearance.

**49.** The defendant must appear within eight days, or, if beyond the jurisdiction, within such period as the indorsement of the information requires. After such period, and within three weeks from the date of service, the informant may apply to the King's Remembrancer to enter an appearance for the defendant on an affidavit of service; after the expiry of such period of three weeks the application must be made to the court or a judge. Where the defendant is an infant or a person of weak or unsound mind not so found the court or a judge, on the application of the informant, assigns a guardian *ad litem* to appear and answer for him. If an appearance has been entered for a defendant by the informant, he may afterwards enter an appearance for himself in the ordinary way, but this is not to affect any proceedings duly taken or right acquired by the informant under or after the appearance entered by him or his right to the costs of the first appearance (*a*). If the defendant objects to the proceedings as invalid, it is the practice to allow him to enter a conditional appearance, without prejudice to any application to set aside the information or the service.

Interrogatories.

**50.** Interrogatories are no longer embodied in the answer, but the informant embodies the substance of the information in interrogatories, if he requires an answer to the information, and files them within eight days after the time limited for appearance, or later by leave of the court or a judge, and delivers a copy thereof to the defendant or his solicitor within such eight days, or within

(*o*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 7; Exchequer Rules, 1866, r. 1 (1).

(*p*) For precedents of English informations for various purposes, see Robertson, Civil Proceedings by and against the Crown, 286 *et seq.*

(*q*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), ss. 8, 10. A form of indorsement is given in Sched. I. to the Act, but for the form at present in use, see Robertson, Civil Proceedings by and against the Crown, 285.

(*r*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), ss. 8, 9; see p. 9, *ante*. A defendant may have as many copies of the information as he requires on payment of one halfpenny per folio (Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 11; Exchequer Rules, 1866, r. 1 (2)).

(*s*) Exchequer Rules, 1866, r. 2 (5), (6).

(*a*) *Ibid.*, r. 2 (1)—(7).

eight days after the appearance of the defendant, if he appears at a later date. The copy delivered must be examined with the original and marked in the King's Remembrancer's Department. The interrogatories may be served out of the jurisdiction by leave of the court or a judge (*b*).

Answer.

**51.** Whether interrogatories are delivered or not, the defendant may, without leave, plead, answer, or demur to the information within fourteen days after the time at which he is or might have been required to answer interrogatories, or at a later date by leave of the court or a judge. His answer may contain not only his answer to the interrogatories, if any, but also such statements material to the case as he thinks fit to make (*c*).

A defendant may demur alone to an information within twelve days after his appearance, but not later (*d*).

When interrogatories are delivered, the defendant must answer within twenty-eight days from their delivery to him (*e*), unless he obtains an extension of time (*f*).

The answer, whether to an information or to interrogatories, must be filed together with a fair copy, the latter being returned to the defendant after examination in the King's Remembrancer's Department, certified as correct and proper to be printed. A duly certified printed copy must be supplied to the informant within forty-eight hours after demand in writing and on payment. The defendant, however, may file a printed answer in the first instance, and this is the usual course. Extra copies may be obtained by the informant on payment (*g*).

Peers and their widows make their answer upon honour (*h*), and corporations under their seal; and, by order made on application by the informant, an answer may be filed without oath or signature (*i*).

Defaulting defendant.

**52.** If the defendant fails to answer, any of the following courses may be adopted:—

(1) An attachment may be issued against the defendant, and he may be brought to the bar of the court and committed to gaol until he answers (*j*).

(2) The informant may proceed to have the information taken *pro confesso*. For this purpose on execution of the attachment, or

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(*b*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 13; Exchequer Rules, 1866, rr. 2 (6), 4. For forms of interrogatories, see Robertson, Civil Proceedings by and against the Crown, 318, 328.

(*c*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), ss. 15, 16; Exchequer Rules, 1866, r. 5 (3). For form of answer, see Robertson, Civil Proceedings by and against the Crown, 296.

(*d*) Exchequer Rules, 1866, r. 5 (1).

(*e*) *Ibid.*, r. 5 (2). For forms of answer, see Robertson, Civil Proceedings by and against the Crown, 305, 320. As to refusal to answer where the defendant might incriminate himself or otherwise, see *Protector* v. *Lumley* (*Lord*) (1655), Hard. 22; *Duplessis* v. *A.-G.* (1753), 1 Bro. Parl. Cas. 415; *A.-G.* v. *Daly* (1833), Hayes & Jo. 379; *A.-G.* v. *Conroy* (1838), 2 Jo. Ex. Ir. 791.

(*f*) Under R. S. C., Ord. 64, r. 8, applied by Ord. 68, r. 2.

(*g*) Exchequer Rules, 1866, r. 6.

(*h*) Fowler, Exchequer Practice, 2nd ed., Vol. I., 362.

(*i*) Annual Practice, 1909, Vol. II., p. 910.

(*j*) Exchequer Rules, 1866, r. 5 (2).

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within three weeks thereafter, the informant may serve a notice of motion on the defendant for a date not less than fourteen days thereafter, and if the defendant does not meanwhile put in an answer the court may order the information to be taken *pro confesso* against the defendant on such terms as it thinks fit. A similar course may be followed where the informant is unable to procure an attachment. The defendant also may submit that the information be taken *pro confesso*, and apply on motion for his discharge. If the decree has been made without the appearance of the defendant at the hearing, or without previous notice having been served upon him or his having been attached, he is entitled to notice of the decree and to apply to have it set aside and for leave to answer within fourteen days, if he is within the jurisdiction, or within a time fixed by the court, if he is beyond the jurisdiction. If he does not so apply, the informant may apply to have the decree made absolute (*k*).

(3) The informant may file a traversing note and serve a copy on the defendant. The effect of this is the same as if the defendant had filed an answer traversing the whole information, or those parts of it to which the note relates, at the date of the note. After service of the note the defendant may not plead, answer, or demur without special leave of the court or a judge (*l*).

Exceptions to answer.

**53.** The answer is to be deemed sufficient if exceptions are not filed within six weeks after the filing of the answer, or if, having been filed, they are not set down to be argued in the next following term. The defendant may submit to the exceptions and file a further answer within eight days, or they will be set down in the Revenue paper and argued (*m*).

Amendment.

**54.** Facts or circumstances occurring after the institution of the proceedings may be introduced (by leave, if the information has been served) into the information by amendment, if the case is otherwise in such a state as to allow of the information being amended (*n*). The amended information is served and answered in a similar manner to the original information (*o*). If an answer is required to amendments and exceptions together, it must be filed within fourteen days of the delivery of the interrogatories or the amended information (*p*).

Where the cause is not in such a state as to permit the information to be amended, the new facts or circumstances may be embodied in a supplemental statement, which is filed in the King's Remembrancer's Department, and annexed to the information and treated, as to answer, evidence, and otherwise, as a supplemental information (*q*).

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(*k*) Exchequer Rules, 1866, r. 7.
(*l*) *Ibid.*, r. 8, where forms of traversing note are given.
(*m*) *Ibid.*, r. 5 (5). Omission to except does not bar the Crown's right to full discovery (*A.-G.* v. *Newcastle-upon-Tyne Corporation*, [1897] 2 Q. B. 384, C. A.).
(*n*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 24. The manner of amendment is prescribed by the Exchequer Rules, 1866, r. 3, and R. S. C., Ord. 28, applied by Ord. 68, r. 2.
(*o*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 12.
(*p*) Exchequer Rules, 1866, r. 5 (4).
(*q*) *Ibid.*, r. 13 (4).

**55.** Only one replication may be filed in each cause, unless the court or a judge otherwise directs, and upon its being filed the cause is to be deemed completely at issue.

Evidence.

**56.** After notice of filing has been served the parties may proceed to verify their case by evidence (*r*). The primary method in which evidence is to be given is by affidavit, and the evidence in chief on both sides must be filed in the King's Remembrancer's Department within eight weeks after issue joined, except by special order. But any party may apply to a judge by summons within fourteen days after issue joined for an order that evidence as to facts and issues specified in the summons may be taken *vivâ voce* at the hearing of the cause. No affidavit is admissible as to the facts or issues covered by such order. Any party may also apply for an order that any particular witness or witnesses may be examined before a special examiner, and in this case the depositions must be filed within the eight weeks provided for the affidavit evidence. Any party within fourteen days after the closing of the evidence may apply for the production for cross-examination of any witness who has made an affidavit, and the judge may order such production either at the hearing or before a special examiner (*s*).

Production of documents.

The defendant must produce documents which are referred to in his answer (*t*), and not only the documents referring to the property claimed, but also anything which might tend to show that the defendant is not entitled to rights which he alleges himself to possess in or about the subject-matter (*a*). The court will also order the production of documents which it has reasonable cause to believe are not immaterial to the informant's case, though the defendant has sworn them to be so (*b*).

Judgment.

**57.** Within eight weeks after the closing of the evidence the informant should set down the cause and serve a subpœna to hear judgment upon the defendant or his solicitor. If he does not, a defendant may set the cause down and serve the subpœna on the informant and any other defendants. The subpœna must be served at least ten days before the return thereof (*c*). If the informant thinks that no evidence is required, he may set down the cause for hearing on information and answer by order of course obtained from the King's Remembrancer's Department, and in that case he does not serve a subpœna to hear judgment.

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(*r*) Exchequer Rules, 1866, r. 9, where forms of replication are given.

(*s*) *Ibid.*, r. 10. As to affidavits, see also R. S. C., Ord. 38, applied by Ord. 68, r. 2. The procedure was discussed in *A.-G.* v. *Metropolitan Rail. Co.* (1880), 5 Ex. D. 218, C. A., where JESSEL, M.R., at p. 224, thought that, since the Judicature Acts, the onus rested on the person opposing the application that evidence should be taken *vivâ voce* to show why it should not be so taken. But the accuracy of this opinion seems to be more than doubtful. The Judicature Acts and Rules have nothing to do with the practice on English informations except so far as they are specially applied; see p. 21, *ante*.

(*t*) *A.-G.* v. *Lambe* (1838), 3 Y. & C. (EX.) 162.

(*a*) *A.-G.* v. *Newcastle-upon-Tyne Corporation*, [1897] 2 Q. B. 384, C. A.

(*b*) *A.-G.* v. *Emerson* (1882), 10 Q. B. D. 191, C. A.

(*c*) Exchequer Rules, 1866, r. 11, where a form of subpœna to hear judgment will be found.

SECT. 6. English Informations.

Costs.

**58.** Costs may be awarded to or against the Crown (*d*). In the former case the taxing master gives a certificate of the costs allowed, and the solicitor of the department concerned may sue out a subpœna for the costs, leading to attachment in default of payment (*e*).

Where the Crown does not proceed with an information, but does not actually withdraw from the cause, the court has no power to dismiss the cause with costs against the Crown (*f*).

Appeal.

**59.** An appeal is lodged and prosecuted in the ordinary way (*g*). There is no provision for an application for a new trial.

Abatement.

**60.** An English information does not abate on the demise of the Crown (*h*). If for any other reason it abates or becomes defective, an order to the effect of an order to revive or of a supplemental decree may be obtained as of course on the allegation of the fact of abatement or defectiveness, and such order is equivalent, for the purposes of service and appearance, to an information filed on the same date, and to which the persons who would be defendants to an information of revivor or supplemental information were defendants. Any person under no disability, or under the disability of coverture only, who is served with the order, may apply to the court or a judge for its discharge within twelve days after service; a person under disability, other than coverture, may apply similarly within twelve days after service for the appointment of a guardian *ad litem*, and until the expiry of such twelve days the order is of no effect against such person (*i*).

# Part II.—Petition of Right.

## SECT. 1.—*Nature and Subject-matter of Petition of Right.*

Petition of right.

**61.** A petition of right is the process by which property of any kind (including money or damages) is recovered from the Crown, whether the basis of the claimant's title be legal or equitable (*k*).

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(*d*) Crown Suits Act, 1855 (18 & 19 Vict. c. 90), ss. 1, 2; Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 21; R. S. C., Ord. 65, applied by Ord. 68, r. 2. For tables of fees and costs, see the schedules to the Exchequer Rules, 1865 and 1866.

(*e*) Exchequer Rules, 1866, r. 21, where a form of subpœna is given. The costs are now taxed by a taxing master, and not by the King's Remembrancer.

(*f*) *A.-G.* v. *Williamson* (1889), 60 L. T. 930.

(*g*) R. S. C., Ord. 58, applied by Ord. 68, r. 2.

(*h*) Stat. (1702) 1 Ann. c. 2 (stat. 1, c. 8, Ruff.), s. 5.

(*i*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 23; Exchequer Rules, 1866, r. 13 (1)—(3).

(*k*) Staundford, Prerogative, 72 b; Com. Dig. tit. Prærog. D, 78; 3 Bl. Com. 256; Chitty, Prerogatives of the Crown, 340 *et seq.*; *Tobin* v. *R.* (1864), 16 C. B. (N. S.) 310, at p. 357. It is erroneous to suppose that a petition of right will lie for matters which are of grace and not of right (*De Bode (Baron)* v. *R.* (1848), 13 Q. B. 364, Ex. Ch., at p. 387, n.; *Feather* v. *R.* (1865), 6 B. & S. 257).

SECT. 1. Nature and Subject-matter of Petition of Right.

When it lies.

A petition of right will lie for the recovery of lands or other corporeal hereditaments (*l*), whether before or after office found (*m*), of incorporeal hereditaments (*n*), of chattels real (*o*), of specific chattels (*p*) and, perhaps, their value, if converted (*q*), and of money claims in general (*r*). Among money claims for which a petition of right is available may be specified claims for liquidated sums due under contracts (*s*), claims for payment for services rendered (*t*), for unliquidated damages for breach of contract (*a*), for the personal estate of deceased intestates (*b*), for dues and duties of all kinds which have been paid to the Crown (*c*), for compensation for land

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(*l*) Bro. Abr. tit. Peticion et Monstrans de Droit; *Doe* d. *Legh* v. *Roe* (1841), 8 M. & W. 579; *Monckton* v. *A.-G.* (1850), 2 Mac. & G. 402.

(*m*) Bro. Abr. tit. Traverse de Office etc. 18; Com. Dig. tit. Prærog. D, 78; *Horner* v. *R.* (1885), referred to in Robertson, Civil Proceedings by and against the Crown, 333.

(*n*) Bro. Abr. tit. Peticion et Monstrans de Droit; Co. Ent. tit. Petition de Droit; *Wicks and Dennis Case* (1589), 1 Leon. 190 (rentcharge); Fitzherbert, Grand Abridgment, 19 (seigniory); *Re Brain* (1874), L. R. 18 Eq. 389, and *James* v. *R.* (1877), 5 Ch. D. 153, C. A. (gales).

(*o*) 37 Lib. Ass. pl. 11, Y. B. M. 9 Hen. 4, pl. 17; Y. B. T. 9 Hen. 6, pl. 15; Y. B. P. 7 Hen. 7, pl. 2; *Canterbury* (*Viscount*) v. *A.-G.* (1843), 1 Ph. 306, 325; *Re Gosman* (1881), 17 Ch. D. 771, C. A.

(*p*) Staundford, Prerogative, 75 b, 76; *Tobin* v. *R.* (1864), 16 C. B. (N. S.) 310, at p. 357; *Feather* v. *R.* (1865), 6 B. & S. 257, at p. 294; *Thomas* v. *R.* (1874), L. R. 10 Q. B. 31, at p. 36.

(*q*) *Tobin* v. *R.*, *supra*; *Feather* v. *R.*, *supra*. See also the unreported cases cited in Robertson, Civil Proceedings by and against the Crown, 336, where the opinion is expressed that probably the remedy by petition of right does not extend to compensation or damages for the conversion of property.

(*r*) *De Bode's* (*Baron*) *Case* (1845), 8 Q. B. 208, at p. 271; *Feather* v. *R.*, *supra*.

(*s*) *Thames Ironworks and Shipbuilding Co.* v. *R.* (1869), 10 B. & S. 33 (extras under a shipbuilding contract); *Yeoman* v. *R.*, [1904] 2 K. B. 429, C. A. (demurrage under a charterparty).

(*t*) This statement is subject to the exceptions mentioned at p. 29, *post*. Several unreported cases where the fiat was granted to petitions of right of this nature will be found in Robertson, Civil Proceedings by and against the Crown, 338.

(*a*) This much-disputed matter was settled in *Thomas* v. *R.*, *supra*, where most of the earlier authorities were discussed, and in *Windsor and Annapolis Rail. Co.* v. *R. and Western Counties Rail. Co.* (1886), 11 App. Cas. 607, P. C.; see also *Churchward* v. *R.* (1865), L. R. 1 Q. B. 173; *Eyre and Spottiswoode* v. *R.* (1887), 3 T. L. R. 5, 304, 447, C. A.; *A.-G.* v. *Stewards & Co., Ltd.* (1901), 18 T. L. R. 131, H. L. For precedents, see Robertson, Civil Proceedings by and against the Crown, 401 *et seq.*

(*b*) Such petitions are usually assigned to the Chancery Division (compare *Monckton* v. *A.-G.*, *supra*). Claims of this nature are subjected to the ordinary period of limitation by the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 3. For precedents, see Robertson, Civil Proceedings by and against the Crown, 416.

(*c*) Except in cases where there is another statutory method of recovery provided, as in the case of income tax; see p. 29, *post*. Instances are *Percival* v. *R.* (1864), 3 H. & C. 217; *Perry's Executors* v. *R.* (1868), L. R. 4 Exch. 27; *De Lancey* v. *R.* (1872), L. R. 7 Exch. 140, Ex. Ch.; *Crossman* v. *R.* (1886), 18 Q. B. D. 256; and *Stern* v. *R.*, [1896] 1 Q. B. 211 (probate, legacy and succession duty); *Winans* v. *R.*, [1908] 1 K. B. 1022, C. A. (estate duty); *Dickson* v. *R.* (1865), 11 H. L. Cas. 175 (excise duty); *Malkin* v. *R.*, [1906] 2 K. B. 886 (compensation under the Licensing Act, 1904 (4 Edw. 7, c. 23); *Peninsular and Oriental Steam Navigation Co.* v. *R.*, [1901] 2 K. B. 686 (light dues); *Tomline* v. *R.* (1879), 4 Ex. D. 252, C. A., and *Northam Bridge Co.* v. *R.* (1886),

SECT. 1. Nature and Subject-matter of Petition of Right.

taken by the Crown (*d*), for pensions (*e*), for sums alleged to be due by the Postmaster-General (*f*), for claims relating to naval prize, and for claims relating to colonial stock or any dividend thereon (*g*).

Where a claim is on the borderline between contract and tort, it has been usual for the Crown to grant the fiat, in order that the matter may be discussed, and to take its objection by demurrer on the pleadings (*h*).

It would seem that where a claim to movable property arises in a British colony or dependency a petition of right will lie in respect of it, if the sum claimed is chargeable on the Imperial and not on the local revenues (*i*). Where the claim relates to land situated abroad a petition of right in respect of it will not lie in this country, except, it would seem, where the land is vested in the Crown for Imperial purposes and not in the Crown for local purposes or in the local Government (*k*).

When it does not lie.

**62.** Since the King can neither do nor authorise a wrong, a petition of right will not lie for damages for a tort alleged to have been committed either by the Crown or by a servant of the Crown acting by the Crown's authority (*l*). On this principle a petition

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55 L. T. 759 (tolls). Other (unreported) instances of different kinds will be found in Robertson, Civil Proceedings by and against the Crown, 243—245.

(*d*) *Blundell* v. *R.*, [1905] 1 K. B. 516; compare *Incorporated Society* v. *R.*, [1900] 1 I. R. 464, C. A.

(*e*) Subject to what is said at p. 29, *post*; see *Oldham* v. *Lords of the Treasury* (*intra* 1800—1827), cited 6 Sim. 220; *Owens* v. *R.*, [1900] 2 I. R. 513.

(*f*) *Postmaster-General* v. *Great Western Rail. Co.* (1889), 5 T. L. R. 714, H. L., and *Re St. James and Pall Mall Electric Lighting Co.*, [1904] W. N. 68 (under the Telegraph Acts); *Clogher Valley Tram Co.* v. *R.* (1892), 30 L. R. Ir. 316 (under the Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74)).

(*g*) By the Colonial Stock Act, 1877 (40 & 41 Vict. c. 59), s. 20), which provides that the certificate of the judgment (see p. 34, *post*) in such a case is to be left with the registrar of the stock instead of the Treasury, and the judgment is to be complied with by him or by some other agent of the colonial Government having possession in England of moneys belonging to that Government.

(*h*) See the case of *Harris's Petition of Right* (1903), not reported, which is discussed in Robertson, Civil Proceedings by and against the Crown, 341. For other cases where the claim savoured of tort, but where the Crown allowed the petition to proceed, see *Windsor and Annapolis Rail. Co.* v. *R. and Western Counties Rail. Co.* (1886), 11 App. Cas. 607, P. C., and *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K. B. 391.

(*i*) There is little authority upon this point; but see *Frith* v. *R.* (1872), L. R. 7 Exch. 365; *Doss* v. *Secretary of State for India in Council* (1875), L. R. 19 Eq. 509, at p. 535; *Dickson* v. *R.* (1865), 11 H. L. Cas. 175; and the unreported cases of *Bushe* v. *R.* (1869), and *Ryland* v. *R.* (1883), referred to in Robertson, Civil Proceedings by and against the Crown, 340.

(*k*) *Re Holmes* (1861), 2 John. & H. 527; *Lautour* v. *A.-G.* (1865), 5 New Rep. 102, 231, C. A.; *Reiner* v. *Salisbury* (*Marquis*) (1876), 2 Ch. D. 378. The exception added in the text is not inconsistent with *Re Holmes*, *supra*, where the land was vested in the Crown by a colonial Act for the purposes of the colony, and therefore was only technically vested in the Imperial Crown. Where land, though situated in a colony, is vested in the Crown for Imperial purposes, a judgment against the Crown on a petition of right in England will operate effectually to put the Crown out of possession.

(*l*) *Canterbury* (*Viscount*) v. *A.-G.* (1843), 1 Ph. 306; *Tobin* v. *R.* (1864), 16 C. B. (N. S.) 310; *Feather* v. *R.* (1865), 6 B. & S. 257. The proper remedy in such a case is by action against the person who committed the alleged tort, since, as the Crown cannot authorise a wrong, it follows that a servant of the

SECT. 1. Nature and Subject-matter of Petition of Right.

of right will not lie for the alleged infringement of a patent by the Crown or its servants (*m*); but in a proper case the Crown has sometimes agreed to be bound by the result of an action for infringement brought against one of its servants (*n*).

Military, naval, and civil officers of the Crown are dismissible at will (*o*), and no petition of right can be brought by them to recover pay, pension or other sums to which they claim to be entitled for their services, or damages in respect of their dismissal (*p*). Neither have they any right of action for breach of an implied warranty of authority against the officer who engaged them (*q*).

Petition of right has also been held to be inapplicable to a claim to a share of funds paid to the Crown under treaty with a foreign power (*r*) and to a claim for damages for property seized by the Government of a foreign country which subsequently came under the sovereignty of the Crown by conquest (*s*).

There are cases where a claimant is entitled by statute to sue the Government department or officials concerned (*t*), and there it would seem that the remedy by petition of right is taken away. The same principle applies where a special statutory means is provided for recovering property from the Crown itself (*a*).

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Crown cannot plead the Crown's authority in his defence. In some British possessions, however, proceedings equivalent to a petition of right may, by statute, be brought against the Crown or its representative (*R.* v. *Williams* (1884), 9 App. Cas. 418, P. C. (New Zealand); *Farnell* v. *Bowman* (1887), 12 App. Cas. 643, P. C. (New South Wales); *A.-G. of the Straits Settlement* v. *Wemyss* (1888), 13 App. Cas. 192, P. C. (Straits Settlement)). *Hettihewage Siman Appu* v. *Queen's Advocate* (1884), 9 App. Cas. 571, P. C., will be found, when examined, not to be opposed to these cases.

(*m*) *Feather* v. *R.* (1865), 6 B. & S. 257; and see *Dixon* v. *London Small Arms Co.* (1876), 1 App. Cas. 632.

(*n*) See the unreported cases referred to in Robertson, Civil Proceedings by and against the Crown, 352.

(*o*) This general principle is subject to certain statutory exceptions, rendering certain officers, usually judicial, irremovable by the Crown. For the principle and the exceptions, see title CONSTITUTIONAL LAW, Vol. VII., p. 22.

(*p*) *Re Tufnell* (1876), 3 Ch. D. 164; *De Dohse* v. *R.* (1886), 66 L. J. (Q. B.) 422, n., H. L.; *Mitchell* v. *R.* (1890), cited [1896] 1 Q. B. 121, n., C. A.; and *Smith* v. *Lord Advocate* (1897), 25 R. (Ct. of Sess.) 112 (military officers); *Shenton* v. *Smith*, [1895] A. C. 229, P. C.; *Dunn* v. *R.*, [1896] 1 Q. B. 116, C. A.; *Gould* v. *Stuart*, [1896] A. C. 575, P. C.; *Young* v. *Adams*, [1898] A. C. 469, P. C.; *Young* v. *Waller*, [1898] A. C. 661, P. C. (civil servants). The principle of these cases is equally applicable to naval officers. See also the Superannuation Act, 1834 (4 & 5 Will. 4, c. 24), s. 30; *Edmunds* v. *A.-G.* (1878), 47 L. J. (CH.) 345; *Cooper* v. *R.* (1880), 14 Ch. D. 311. A series of unreported cases will be found in Robertson, Civil Proceedings by and against the Crown, 357, 359.

(*q*) *Dunn* v. *Macdonald*, [1897] 1 Q. B. 555, C. A.

(*r*) *De Bode* (*Baron*) v. *R.* (1851), 3 H. L. Cas. 449; *Rustomjee* v. *R.* (1876), 2 Q. B. D. 69, C. A.

(*s*) *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K. B. 391.

(*t*) See titles CONSTITUTIONAL LAW, Vol. VI., p. 414; PUBLIC AUTHORITIES AND PUBLIC OFFICERS; *De Bode* (*Baron*) v. *R.*, *supra*; *Frith* v. *R.* (1872), L. R. 7 Exch. 365.

(*a*) As, for instance, by the National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 55, and the Acts relating to income tax. Cases as to income tax in this connection are *Holborn Viaduct Land Co.* v. *R.* (1887), 52 J. P. 341, and *Hunter* v. *R.*, [1903] 1 K. B. 514, C. A.

SECT. 2. SECT. 2.—*Procedure.*

Procedure.

Parties.

**63.** The plaintiff in a petition of right is at the present day entitled the suppliant. He may, it seems, be either a British subject or an alien (*b*). A petition of right may be brought by the executor, administrator, or other representative (*c*), or by the assignee (*d*) of a claimant.

The petition may be lodged against the King either in his public or in his private capacity, according as the subject-matter concerns him in the right of his Crown and Government or in respect of his private property or matters affecting him as an individual (*e*). It would seem that it will not lie against him for property received by his predecessor (*f*), and will abate on the demise of the Crown (*g*).

Where the property in dispute has been granted away or disposed of by the King or his predecessors, a copy of the petition and fiat may be served on the person in the possession or enjoyment of the property, who may be required to answer thereto (*h*).

Petition.

**64.** A petition of right may be entitled either in the King's Bench Division or in the Chancery Division, as the suppliant thinks fit, according to the subject-matter (*i*), or in the Probate, Divorce and Admiralty Division, if it relates to naval prize (*k*). It should be addressed to the King, should state the christian name and surname and usual place of abode of the

(*b*) *Re R. and von Frantzius* (1858), 2 De G. & J. 126 (Prussian); *De Dohsé* v. *R.* (1886), 66 L. J. (Q. B.) 422, n., H. L. (Austrian). The older authorities which speak of the suppliant as a "subject"—namely, Staundford, Prerogative, 72 b *et seq.*; 3 Bl. Com. 256; Chitty, Prerogatives of the Crown, 340, 341—do not really throw much light on the matter, if it is considered that in earlier times the right of an alien to maintain even a personal action was by no means admitted.

(*c*) *De Bode* (*Baron*) v. *R.* (1848), 13 Q. B. 364, Ex. Ch.; and see the cases as to the recovery of the personal estate of intestates, p. 27, *ante*.

(*d*) *Re Rolt* (1859), 4 De G. & J. 44.

(*e*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), ss. 11, 13, 14.

(*f*) *A.-G.* v. *Köhler* (1861), 9 H. L. Cas. 654; compare also *Ryves* v. *Wellington* (*Duke*) (1846), 9 Beav. 579, at p. 601. But see the wording of s. 5 of the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34).

(*g*) This seems to follow from the fact that a petition of right can only proceed by the fiat of the Sovereign, which is a personal authorisation given by the individual monarch, but no doubt his successor could adopt his fiat.

(*h*) This procedure, which was first introduced by the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 5, was intended to take the place of the *scire facias*, whereby the King's grantee was brought before the court. It is confined strictly to cases where there has been a grant or disposal of the property in question by the Crown. Instances of such joinder are *Kirk* v. *R.*, *A.-G.* v. *Kirk* (1872), L. R. 14 Eq. 558 (misjoinder of a military engineer); *Re Gosman* (1880), 15 Ch. D. 67; (1881) 17 Ch. D. 771, C. A. (joinder of the Treasury Solicitor on a claim to an intestate's property); and *Re Banda and Kirwee Booty*, *Kinloch* v. *R.*, [1884] W. N. 80, C. A. (joinder of the Secretary of State for India as possessor of certain booty claimed from the Crown). A person who is misjoined can, it seems, demur (*Kirk* v. *R.*, *supra*, at p. 563, *per* WICKENS, V.-C., appears to be incorrect), or apply to be struck out under R. S. C., Ord. 16, r. 11. An interested person, who is not joined, can apparently apply to be joined.

(*i*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 1.

(*k*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 52.

suppliant and of his solicitor, if any, and should set forth with convenient certainty the facts entitling the suppliant to relief (*l*).

It may conclude either with a general prayer that it may be indorsed "let right be done," the specific claims being set out in the body of the petition, or with a special prayer. In either case any claim, whether substantive or ancillary, may be made which is not incompatible with the Crown's prerogative or does not lie outside the matters which are properly the subject of a petition of right. It must be signed by the suppliant, his counsel or solicitor (*m*).

Fiat.

**65.** The petition must be left with the Home Secretary for submission to the King, with a view to its receiving the fiat if the King thinks fit (*n*). The King may grant or refuse his fiat at his pleasure (*o*), and it cannot be said to be absolutely the duty of the Attorney-General to advise the grant of the fiat in every case where the petition discloses a reasonable and probable ground of claim (*p*). The fiat may be granted to the whole or part of the petition, and may be either absolute or qualified, and the qualification may be of any nature, either forming part of the actual fiat or consisting of an intimation given when the petition is returned to the suppliant with the fiat (*q*). Until the fiat has been granted the petition cannot be set down for trial (*r*).

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(*l*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 1. A petition of right should set out the suppliant's claim with even more clearness and certainty than an ordinary statement of claim, since the Crown's advisers have to depend upon it to show them whether such a case is disclosed as to justify them in recommending the King to grant his fiat. The view that looseness of drafting is permissible is erroneous (*West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K. B. 391, at p. 399). *Tobin* v. *R.* (1863), 14 C. B. (N. S.) 505, at pp. 519, 524, is not contrary to this; the observations there only refer to the particular petition of right which was then before the Court. See also the unreported judgments of the C. A. in *De Dohsé* v. *R.* (1885), 1 T. L. R. 509, C. A., cited in Robertson, Civil Proceedings by and against the Crown, 374. For a form of petition, see Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), Sched., No. 1; and for numerous precedents, see Robertson, Civil Proceedings by and against the Crown, 401 *et seq.*

(*m*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 1.

(*n*) *Ibid.*, s. 2. The Home Secretary is not liable to an action at the suit of the suppliant for advising the King not to grant his fiat (*Irwin* v. *Grey* (1862), 3 F. & F. 635; contrast *Fulton* v. *Norton*, [1908] A. C. 451). It is doubtful whether a mandamus would lie to compel him to submit the petition to the King if he failed to do so, see *Re Mitchell* (1896), 12 T. L. R. 324, 458, C. A.

(*o*) *Tobin* v. *R.*, *supra*. Certain observations in *Ryves* v. *Wellington* (*Duke*) (1846), 9 Beav. 579, at p. 600, and *Re Nathan* (1884), 12 Q. B. D. 461, at p. 479, C. A., are, it is submitted, erroneous in suggesting that there is any limit to the absolute discretion of the Crown. There is no means by which any court could control the Crown in its grant of, or refusal to grant, the fiat.

(*p*) It has been suggested that it is the duty of the Attorney-General to advise the Crown to grant its fiat to all petitions except those which are frivolous; but it is doubtful whether there is any real ground for this view. In any case the Attorney-General could only be responsible to Parliament in the matter, and not to the courts.

(*q*) Staundford, Prerogative, 73 a; *Bankers' Case* (1700), 14 State Tr. 1, at p. 59. The Crown occasionally, while granting the fiat, in order that the matter may come before the courts, intimates to the suppliant that it proposes to demur and that, in its opinion, the petition must fail.

(*r*) *Re Mitchell*, *supra*, at p. 458, C. A.

SECT. 2. **Procedure.**

Place of trial.

**66.** A petition of right, if entitled in the King's Bench Division, must state the venue in the margin (*s*). It would seem that the King may, by way of qualification to his fiat, order the trial to take place at some other venue than that stated in the margin, or fix a venue if none be so stated (*a*), and also that the King may, under certain conditions, order by his fiat that the trial shall take place elsewhere than in England (*b*). If the Crown or the suppliant desire to change the venue after fiat, the procedure, it seems, is by petition to the Lord Chancellor, who may thereupon, if he thinks fit, change the venue (*c*).

Filing and delivery.

**67.** The petition is filed in the Writ, Appearance, and Judgment Department of the Central Office (*d*). A copy of the petition and fiat must be left with the Treasury Solicitor, with an indorsement praying for a plea or answer within twenty-eight days, and a copy must also be served on any third party, with notice to appear within eight days and to plead or answer thereto within fourteen days (*e*).

Pleading.

**68.** The petition may be answered by way of answer, plea or demurrer in the Chancery Division, or in the King's Bench Division by way of plea or demurrer, or by both plea and demurrer by or in the name of the Attorney-General on behalf of the King or by or on behalf of the third party, and the same matter as would be sufficient ground of answer or defence in point of law or fact to such petition on behalf of the King may be alleged on behalf of the third party (*f*). The Crown can exercise all its prerogative rights in the

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(*s*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 1.

(*a*) See *Re Pering* (1837), 2 M. & W. 873; and compare the Petitions of Right (Ireland) Act, 1873 (36 & 37 Vict. c. 69), s. 2. It does not appear that the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 1, by providing that the venue should be stated in the margin, affected the Crown's prerogative to grant the fiat with such qualifications as it chose, including a qualification involving a change of venue (see p. 31, *ante*).

(*b*) The opposite view has been prevalent but, it is submitted, is incorrect, since the power of the Crown to grant a qualified fiat seems to be unlimited (see p. 31, *ante*). But it is suggested that the conditions of the exercise of the power are that the matter must be within the cognisance of the court to which it is sent, that its trial there does not conflict with the local law, and that the satisfaction of the judgment, if against the Crown, will fall on the Imperial revenues.

(*c*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), ss. 3, 4. For forms, see Robertson, Civil Proceedings by and against the Crown, 415.

(*d*) Practice Masters' Rules, r. 15; Chancery General Order, February 1, 1862, r. 1. If the petition is in writing, a printed copy must also be filed. The fees are £1 (impressed) for the petition and 5*s*. for each copy for service.

(*e*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), ss. 3, 5. The copies served must be sealed at the Central Office (Chancery General Order, February 1, 1862, r. 3). For forms of indorsement and of appearance of a third party see the schedule to the Act, Nos. 2, 3, 4; and see also R. S. C., Ord. 12.

(*f*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 6. It has hitherto been the practice of the Crown and third parties to demur, if so advised, in spite of the general abolition of demurrers, and in spite of the fact that s. 7 of the Act applies the current practice to petitions of right (see p. 33, *post*).

matter of pleading, such as pleading double and denying in general terms (*g*). At common law the Crown never counterclaims, but has done so in the Chancery Division. It is entitled to plead a set-off (*h*).

A petition of right cannot be amended, unless a fresh fiat is obtained to the amended petition (*i*).

Applications to obtain extension of time for pleading should, it would seem, be made by summons to a judge in chambers, and not to a master, but the practice is to make them to the latter.

Practice generally.

**69.** The laws and statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, and appeal in actions between subject and subject, and the practice and course of procedure of the courts for the time being in reference to such actions, is, unless the court otherwise orders, applicable to petitions of right; but the subject is not to have any remedy against the Crown to which he would not have been entitled before the Petitions of Right Act, 1860 (*k*).

Interlocutory proceedings.

**70.** The practice is for the suppliant not to take out a summons for directions (*l*), but applications by the suppliant or the Crown or a third party are made in the ordinary way by master's summons, except as to the place of trial (*m*) and possibly extension of time for pleading (*n*). The Crown or third party can obtain discovery from

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(*g*) *Tobin* v. *R.* (1863), 14 C. B. (N. S.) 505. For precedents, see Robertson, Civil Proceedings by and against the Crown, 402 *et seq.*

(*h*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7; *De Lancey* v. *R.* (1871), L. R. 6 Exch. 286, at p. 288; *Rustomjee* v. *R.* (1876), 1 Q. B. D. 487, at p. 491.

(*i*) Obviously the suppliant has no right to prosecute a claim which is not the same as the claim which the fiat permitted him to prosecute, and s. 7 of the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), cannot affect this. In *Re R. and Canterbury* (*Viscount*) (1840), 1 Coop. *temp.* Cott. 143, at p. 146, the petition was amended by the consent of the Attorney-General, though it seems clear that he had no power to give such consent; see the unreported cases cited Robertson, Civil Proceedings by and against the Crown, 390, 391.

(*k*) 23 & 24 Vict. c. 34, s. 7; *Tobin* v. *R.*, *supra*; *Tomline* v. *R.* (1879), 4 Ex. D. 252, C. A. S. 15 of the Act (repealed by the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59)) gave the judges (now the Rule Committee) power to make rules for petitions of right. The only rules made under this power were the Chancery General Order, February 1, 1862, which is still in force. The effect of the above-cited provision is, it is submitted, to apply to petitions of right the rules of practice (see title PRACTICE AND PROCEDURE), which are from time to time current with regard to the matters specified, subject always to the special nature of a petition of right, the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), and the general prerogative rights of the Crown.

(*l*) A summons for directions has been taken out by a suppliant in one case only, and it was there dismissed by the master on objection taken on behalf of the Crown on the ground that the manner in which a Petition of Right is launched is inconsistent with such a summons, and that the time and manner of pleading are fixed by the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34). [This point, however, cannot be considered as settled.—EDS.]

(*m*) See p. 32, *ante*.

(*n*) See *supra*, where it is suggested that the usual practice is erroneous.

SECT. 2. Procedure.

the suppliant, but the suppliant is not entitled to discovery against the Crown (*o*).

Trial.

**71.** A petition of right is entered and set down for trial like an ordinary action, and is tried in the ordinary way, unless the Crown demands a trial at bar (*p*).

Security for costs.

**72.** The suppliant, but not the Crown, can be called upon to give security for costs (*q*).

Limitation of action.

**73.** The Limitation Act, 1623, does not apply to petitions of right (*r*), but petitions of right for the recovery of the personal estate of a deceased person are subject to the same limitation as actions for the same purpose brought against a subject (*s*).

Judgment.

**74.** If the Crown or a third party fails to plead, answer, or demur in due time, the suppliant may apply to the court or a judge for an order that the petition may be taken as confessed, and the court may so order. The order may be afterwards set aside on such terms as the court thinks proper (*t*).

The judgment may declare that the suppliant is or is not entitled to all or any of the relief prayed, and a judgment that he is entitled to relief will have the effect of a judgment of *amoveas manus* (*u*). The judgment must be certified, on the application of the suppliant, by one of the judges of the court in which the petition was presented, either to the Treasury or to the Treasurer of the King's Household, according as the petition was addressed to the King in his public or in his private capacity. It thereupon becomes the duty of the recipient of the certificate to see that the judgment is satisfied (*x*).

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(*o*) *Thomas* v. *R.* (1874), L. R. 10 Q. B. 44; *Tomline* v. *R.* (1879), 4 Ex. D. 252; *A.-G.* v. *Newcastle-upon-Tyne Corporation*, [1897] 2 Q. B. 384, C. A., at p. 395. The matter is more doubtful in Chancery; contrast *A.-G.* v. *London Corporation* (1850), 2 Mac. & G. 247, at p. 259, and *A.-G.* v. *Clapham* (1853), 10 Hare, App. II., at pp. lxviii., lxx.

(*p*) See p. 33, *ante*. The hearing fee is £2.

(*q*) *Tomline* v. *R.*, *supra*, at p. 254.

(*r*) *Rustomjee* v. *R.* (1876), 1 Q. B. D. 487. The criticism on this decision in works dealing with the question of limitation of time appears to be based on a misapprehension. The Limitation Act, 1623 (21 Jac. 1, c. 16), only applies to actions, and a petition of right is not an action; see, generally, title LIMITATION OF ACTIONS.

(*s*) Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 3.

(*t*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 8; *Tobin* v. *R.* (1863), 14 C. B. (N. S.) 505; *Re Banda and Kirwee Booty, Kinloch* v. *R.*, [1882] W. N. 164; [1884] W. N. 80, C. A. The application, it seems, should be made to a judge in chambers, though in the last-cited case it was made by motion (see Robertson, Civil Proceedings by and against the Crown, 394, and the unreported case there cited and discussed).

(*u*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), ss. 9, 10. A judgment of *amoveas manus* (that the hands of the Crown be amoved) puts the Crown or its grantee, without more, out of possession (Staundford, Prerogative, 77 b; Chitty, Prerogatives of the Crown, 348). For forms of judgment, see Robertson, *ibid.*, 416; and compare the similar forms of judgment on traverse of escheat, Robertson, *ibid.*, 460.

(*x*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), ss. 13, 14. For the form of certificate see *ibid.*, Sched., No. 5. The process of certifying is usually omitted in practice.

SECT. 2. Procedure.

Costs.

**75.** The Attorney-General or other person on behalf of the Crown and any third party are entitled to recover costs against the suppliant, and the suppliant against the Crown and any third party, in the same manner and subject to the same restrictions and discretion and under the same rules, so far as they are applicable, as are in force for the payment or receipt of costs in proceedings between subject and subject (*y*).

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# Part III.—Proceedings on the Crown Side of the King's Bench Division.

## SECT. 1.—*Scire Facias.*

*Scire facias.*

**76.** This species of *scire facias* is employed for the purpose of rescinding Crown grants, charters, and franchises (*a*). Such a grant, in order to be rescinded by this process, must be of record (*b*).

The proceedings are conducted through the agency of the Crown Office, as successor of the Petty Bag Office (*c*). If they are initiated by a subject, the fiat of the Attorney-General must be obtained. Declarations and other pleadings are to be delivered to the opposite party and not filed (*d*).

The judgment, if in favour of the applicant, orders that the Crown grant is to be restored to Chancery, there to be cancelled. The parties attend in Chancery, and the seal is cut off and the enrolment vacated (*e*).

## SECT. 2.—*Inquisition of Escheat.*

### SUB-SECT. 1.—*Inquisition.*

Inquisition of escheat.

**77.** In England and Wales, exclusive of the Duchy of Lancaster, the special commission of escheat (*f*) is issued by the

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(*y*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), ss. 11, 12. These provisions prevent the application of the Crown's prerogative, whereby it neither pays nor receives costs. It would seem that the Crown still keeps its prerogative remedies for the recovery of costs, in spite of these provisions, since s. 11 does not expressly deprive the Crown of the use of those remedies in the case of a petition of right (see *R.* v. *Cowing* (1877), not reported, referred to in Robertson, Civil Proceedings by and against the Crown, 398).

(*a*) Instances are *Peter* v. *Kendal* (1827), 6 B. & C. 703; *Eastern Archipelago Co.* v. *R.* (1853), 2 E. & B. 310, 856, Ex. Ch.; *R.* v. *Hughes* (1866), L. R. 1 P. C. 81. *Scire facias* on recognisance in the Crown Office was abolished by Crown Office Rules, 1886, r. 127 (now 1906, r. 116), and *scire facias* to repeal letters patent for an invention by the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 26 (1), now repealed by the Patents and Designs Act, 1907 (7 Edw. 7, c. 29). For *scire facias* on the Revenue side, see p. 18, *ante*.

(*b*) *R.* v. *Hughes*, *supra*.

(*c*) See note (*l*) on p. 37, *post*.

(*d*) Petty Bag Act, 1849 (12 & 13 Vict. c. 109), s. 30. For a form of pleadings, see *R.* v. *Eastern Archipelago Co.*, *supra*.

(*e*) *Bynner* v. *R.* (1846), 9 Q. B. 523, Ex. Ch.; *R.* v. *Eastern Archipelago Co.*, *supra*.

(*f*) Proceedings in connection with inquisitions of escheat are governed by the Escheat Procedure Rules, 1889, made under s. 2 of the Escheat (Procedure)

SECT. 2. Inquisition of Escheat.

Clerk of the Crown in Chancery under the Wafer Great Seal. After reciting that the King has been given to understand that certain hereditaments have escheated to the Crown, it orders the commissioners to inquire by a jury as to the hereditaments of the deceased in the county, when and where he died, and whether without disposing of such hereditaments by will and without heir, and, if so, the yearly value of the same and of whom they were held, whether they have devolved to the Crown by escheat, who has received the mesne profits of them, and in whose possession they are. It then orders them to seize the hereditaments into the King's hands and to return their inquisition, together with the commission, into the High Court. It also gives them power to summon witnesses, and orders the sheriff to summon a jury (*g*).

Inquiry.

**78.** The inquiry is held in public, at a place appointed by the commissioners in the county where the lands are situate, and may be adjourned from time to time and from place to place. The number of the jury, which is to be returned and impanelled by the sheriff of the county and sworn by the commissioners to give a true verdict, is to be twelve, but the commissioners may proceed with not less than nine. It may be discharged by the commissioners and a fresh jury impanelled. The commissioners may take the verdict or finding of a majority. The witnesses may be compelled to attend by Crown Office subpœna, and their evidence, when they are unable to attend, may be taken on affidavit. Any person claiming or setting up any title to the hereditaments in question is entitled to be heard and may cross-examine any witness by himself, his counsel or solicitor.

Any one or more of the commissioners may, subject to the terms of the commission, exercise the powers of the commissioners (*h*).

Entry.

**79.** No actual entry is made unless a tenant is in occupation under a tenancy which was not valid or which does not continue under the escheat to be so. If a valid tenancy still subsists, the tenant is asked to attorn to the Crown (*i*).

Return.

**80.** The inquisition is to be in writing or print, or both, under the hands and seals of the commissioners present and of the jurors concurring therein. It need not be indented, nor need a counterpart be delivered to any of the jury. It must find of whom the real estate was held, and must contain a finding with respect to every other material matter specified in the commission (*k*).

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Act, 1887 (50 & 51 Vict. c. 53). See also title DESCENT AND DISTRIBUTION. It was contemplated that rules should also be made for traverse of inquisition, but no such rules have yet appeared. Neither have any rules been made for the Duchy of Lancaster; and in the absence of such rules the procedure remains as it was before the Escheat (Procedure) Act, 1887 (50 & 51 Vict. c. 53), s. 3 (3). As to the Duchy of Lancaster generally, see title CONSTITUTIONAL LAW, Vol. VII., pp. 217 *et seq.*

(*g*) For the most recent form of special commission, see Robertson, Civil Proceedings by and against the Crown, 448.

(*h*) Escheat Procedure Rules, 1889, rr. 2—9.

(*i*) For a form of attornment, see Robertson, Civil Proceedings by and against the Crown, 432, 462.

(*k*) Escheat Procedure Rules, 1889, rr. 10—12. For precedents, see Robertson, Civil Proceedings by and against the Crown, 449, 452.

It must be returned, with the commission, into the Central Office of the Supreme Court of Judicature and filed in the Crown Office Department (*l*).

Amendment.

**81.** No proceeding or inquisition is to be quashed or avoided by any omission or informality which is capable of being supplied or amended, and the High Court of Justice or a judge thereof may make any amendment or direct any proceedings which may be just. The court or a judge may also at any time direct that the inquisition shall stand good notwithstanding any specified defect, and such direction is to be indorsed on the inquisition by the proper officer and to have effect as part of the inquisition (*m*).

*Melius inquirendum.*

**82.** A *melius inquirendum* under the same commission, as to the whole or any part of the matters specified in the commission, is awarded on the fiat of the Attorney-General or by the Lord Chancellor. Thereupon the inquest is held *de novo*, except so far as such award directs that the first or any former inquisition shall stand good. The proceedings in such a case are similar to those on a first inquest (*n*).

Objection.

**83.** Any person on whom an inquisition is served, and who thinks himself aggrieved by any finding therein, may within six months after service, or within such enlarged time as the court allows, file a statement in writing of his objections in the office in which the inquisition is filed. The court may then, on application on behalf of the Crown or the Prince of Wales, according as the title of one or the other has been found by the inquisition, appoint a fit person to hold an inquiry on notice to the person aggrieved, on or near the land in question, with power to summon witnesses and administer oaths. He makes a return to the court, which is filed in the office where the inquisition is filed, and the inquisition is to be deemed to be altered in accordance with the return (*o*).

Duchy of Lancaster.

**84.** The procedure in the Duchy of Lancaster is similar, except that the special commission is issued under the seal of the Duchy (*p*).

SUB-SECT. 2.—*Traverse of Inquisition.*

Traversing the inquisition.

**85.** Any person claiming or setting up any title to the real estate or interest therein which is the subject-matter of the inquest, whether a first inquest or an inquest held under a *melius inquirendum*, is entitled to traverse the inquisition or object thereto in such

(*l*) Escheat Procedure Rules, 1889, r. 13. The senior clerk of the Crown Office department has taken over the business of the Petty Bag Office by virtue of R. S. C., January 30, 1889, and, among such business, the matters connected with the return of inquisitions of escheat and subsequent proceedings thereon, which belonged to the common law jurisdiction of the Court of Chancery. The business of that office, so transferred, is governed by the Petty Bag Act, 1849 (12 & 13 Vict. c. 109), ss. 29—31, 45 (the remainder of the Act was repealed by the Statute Law Revision (No. 2) Act, 1893 (56 & 57 Vict. c. 54), and the Petty Bag Rules, 1848).

(*m*) Escheat Procedure Rules, 1889, r. 17.

(*n*) *Ibid.*, rr. 14, 15.

(*o*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 52.

(*p*) Compare note (*f*) on p. 35, *ante*.

SECT. 2. Inquisition of Escheat.

manner as may be from time to time directed by the Rules of the Supreme Court (*q*).

Leave to traverse.

An intending traverser in England and Wales, exclusive of the Duchy of Lancaster, must first apply by petition in the Chancery Division for leave to traverse the inquisition. His petition must set out concisely his alleged title, and he must show, by affidavits and documents, that he has a *primâ facie* case. The petition must be served on the Treasury (*a*).

Form of traverse.

The traverse is prepared in a form which has not been affected by any of the modern alterations in pleading (*b*), and the traverser labours under the restrictions which are imposed upon those who are pleading against the Crown (*c*). It must be filed in the Crown Office Department and a copy delivered to the Treasury solicitor (*d*). The traverser is in the position of a defendant, the inquisition which is being traversed being regarded as the Crown's declaration (*e*).

Pleadings.

The subsequent pleadings follow in accordance with the ancient forms, namely, with the *absque hoc* or *sans ceo*, or, if the Crown admits the traverser's claim, the Attorney-General files a confession on behalf of the Crown (*f*).

Trial.

**86.** If the Crown disputes the traverser's claim, the issues go into the King's Bench Division for trial, in the same manner and subject to the same right of appeal as the issues in an ordinary action, except that the proceedings are under the general charge of the Crown Office Department. The case should be set down and notice of trial given, it would seem, by the Crown as being in the position of plaintiff (*g*).

Judgment.

**87.** The judgment, if against the Crown after trial or upon confession, is one of *amoveas manus* or *ouster le main;* if in favour

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(*q*) Escheat (Procedure) Act, 1887 (50 & 51 Vict. c. 53), s. 2 (2); Escheat Procedure Rules, 1889, r. 16. The R. S. C. have not hitherto dealt with the matter, and the old practice must be deemed still to prevail (Escheat (Procedure) Act, 1887 (50 & 51 Vict. c. 53), s. 3 (3)). As to objections otherwise than by traverse, see p. 37, *ante*.

(*a*) For forms of petition and order, see Robertson, Civil Proceedings by and against the Crown, 451, 452. As to the evidence required, see *Ex parte Webster* (1802), 6 Ves. 809; *Re Sadler* (1816), 1 Madd. 581; *Ex parte Gwydir (Lord)* (1819), 4 Madd. 281; *Re Parry, Ex parte Beaufort (Duke)* (1866), L. R. 2 Eq. 95.

(*b*) For a precedent, see Robertson, Civil Proceedings by and against the Crown, 454.

(*c*) In particular, he must not plead double, and must set up a title in himself, and not that of a third party (see Robertson, Civil Proceedings by and against the Crown, pp. 438, 565, and the unreported cases there cited).

(*d*) Petty Bag Act, 1849 (12 & 13 Vict. c. 109), s. 30.

(*e*) See *Bankers' Case* (1700), 14 State Tr. 1; *R.* v. *Roberts* (1744), 2 Stra. 1208; and the unreported cases in Robertson, Civil Proceedings by and against the Crown, 439.

(*f*) For forms of these pleadings, see Robertson, Civil Proceedings by and against the Crown, 457—459. The *absque hoc* or *sans ceo* is that portion of the pleading in which the plea alleges that "without this," that is, if the plea set up is not true, then the plea of the opposite party is true.

(*g*) This was the practice under the old statutes, which were repealed by the Escheat (Procedure) Act, 1887 (50 & 51 Vict. c. 53), and it must be taken still to continue, until altered (*ibid.*, s. 3 (3)). As to the Crown being in the position of a plaintiff, see *supra*.

of the Crown, its form is that the inquisition be not quashed, and that the hands of the King be not amoved. It is entered in the Crown Office Department and enrolled (*h*).

Costs.

**88.** Costs may be awarded to or against the Crown, inasmuch as the Crown is to be regarded as plaintiff and the traverser as defendant (*i*).

Duchy of Lancaster

**89.** The procedure in the Duchy of Lancaster is similar to that already described, except that the petition for leave to traverse is presented to the Chancellor of the Duchy and the trial of the issues takes place on circuit in the Duchy, unless it is removed to Middlesex (*k*).

## SECT. 3.—*Habeas Corpus.*

### SUB-SECT. 1.—*Nature and Scope of the Writ of Habeas Corpus ad Subjiciendum.*

#### (i.) *General Nature of the Writ.*

The prerogative writ of *habeas corpus.*

**90.** The writ of *habeas corpus ad subjiciendum*, which is commonly known as the writ of *habeas corpus*, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody (*a*). It is a prerogative writ by which the King has a right to inquire into the causes for which any of his subjects are deprived of their liberty (*b*).

It is a remedial mandatory writ by which the High Court and the judges of that court, at the instance of a subject aggrieved, command the production of that subject, and inquire into the cause of his imprisonment (*c*). If there is no legal justification for the detention, the party is ordered to be released (*d*).

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(*h*) For the forms, see Robertson, Civil Proceedings by and against the Crown, 460, 461; and see note (*u*) on p. 34, *ante*.

(*i*) See p. 38, *ante;* Crown Suits Act, 1855 (18 & 19 Vict. c. 90), ss. 1, 2. Apart from the Crown Suits Act, 1855, there would be no costs in such proceedings (*Ward* v. *Templeton* (1787), Vern. & Scr. 123).

(*k*) See p. 37, *ante*. The removal is effected by *mittimus*, for a form of which see Robertson, Civil Proceedings by and against the Crown, 442, 461.

(*a*) *R.* v. *Ferrers* (*Earl*) (1758), 1 Burr. 631. "The provisions made by the law for the liberty of the subject have been found for ages effectual to an extent never known in any other country through the medium of the summary right to the writ of *habeas corpus*" (*R.* v. *Batcheldor* (1839), 1 Per. & Dav. 516, *per* Lord DENMAN, C.J., at p. 567). See also *Cox* v. *Hakes* (1890), 15 App. Cas. 506; *Barnardo* v. *Ford*, *Gossage's Case*, [1892] A. C. 326.

(*b*) See *Crowley's Case* (1818), 2 Swan. 1, *per* Lord ELDON, L.C., at p. 48; *R.* v. *Cowle* (1759), 2 Burr. 834, *per* Lord MANSFIELD, C.J., at p. 856; Corner, Crown Office Practice, p. 110. "If any man be imprisoned by another a *corpus cum causa*, *i.e.*, *habeas corpus*, can be granted to those who imprison him, for the King ought to have an account rendered to him concerning the liberty of his subjects, and the restraint thereof" (2 Roll. Abr. 69).

(*c*) See *per* WILMOT, C.J., Wilm. at p. 88.

(*d*) Several other writs of *habeas corpus* were known to the common law. These were the writs of *habeas corpus ad respondendum*, *habeas corpus ad satisfaciendum*, *habeas corpus ad prosequandum*, *habeas corpus ad testificandum*, *habeas corpus ad deliberandum*, and *habeas corpus ad faciendum et recipiendum*, frequently known as *habeas corpus cum causa*. Their general object was to secure the production of an individual before a court or judge for various purposes, as the names of the writs indicate. This in modern practice is usually

SECT. 3. **Habeas Corpus.**

General scope of the writ.

**91.** The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty (*e*). Where the detention of an individual is under process for criminal or supposed criminal causes the jurisdiction of the court and the regularity of the commitment may be inquired into (*f*). Where the restraint is imposed on civil grounds under claim of authority, the legal validity of such claim may be investigated and determined (*g*), and where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be inquired into on the return to a writ of *habeas corpus*, and the custody awarded to the person having the legal right thereto (*h*). In other cases, where the personal freedom of an individual is arbitrarily interfered with by another, the release of the former from the illegal detention may be effected by *habeas corpus* (*i*). The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in *habeas corpus* (*k*).

Writ available against the Executive.

**92.** In any matter involving the liberty of the subject the action of the Crown or its ministers, or high officials of the Privy Council, or the executive Government, is subject to the supervision and control of the judges on *habeas corpus* (*l*). It is this fact which makes the prerogative writ of the highest constitutional importance, it being a remedy available to the meanest subject against the most powerful (*m*). No peer or lord of Parliament has privilege of peerage

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effected by other procedure, though some of the writs are still occasionally resorted to (3 Bl. Com. 129 *et seq.*; Com. Dig. tit. Habeas Corpus; Bac. Abr. tit. Habeas Corpus).

(*e*) "The great and efficacious writ in all manner of illegal confinement is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf" (3 Bl. Com. 131).

(*f*) See p. 49, *post*.

(*g*) See p. 44, *post*.

(*h*) See p. 52, *post*.

(*i*) See p. 48, *post*.

(*k*) This is apparent from the very wording of the writ, which requires the person to whom it is addressed to have the body of the person named therein who is "taken and detained under your custody, as is said, together with the day and cause of his being taken and detained, to undergo and receive all and singular such matters and things as the court shall then and there consider of concerning him in this behalf." See *Barnardo* v. *Ford*, *Gossage's Case*, [1892] A. C. 326, *per* Lord HERSCHELL, at p. 339. On the same principle that the object of the writ of *habeas corpus* is merely to protect the liberty of the subject, it has been held that the master of an apprentice was not entitled to a writ of *habeas corpus* for the purpose of regaining the custody of the apprentice who had of his own accord entered the service of another person (*R.* v. *Reynolds* (1795), 6 Term Rep. 497; *R.* v. *Edwards* (1798), 7 Term Rep. 745; *Ex parte Lansdown* (1804), 5 East, 38; *Ex parte Gill* (1806), 7 East, 376).

(*l*) See stat. (1640) 16 Car. 1, c. 10; and p. 43, *post*.

(*m*) "It is a writ of such a sovereign and transcendent authority that no privilege or person can stand against it" (Wilm. 88). Precedents are cited in *Darnel's Case* (1627), 3 State Tr. 1, in which the writ of *habeas corpus* was used by subjects against the Crown as early as the reign of Henry VII.; see also Fry, Report of the Case of the Canadian Prisioners, Introduction, p. 10. During the Stuart period the writ was frequently used as the constitutional remedy in cases of illegal imprisonment by the Crown or the Executive. In

or Parliament against being compelled to render obedience to a writ of *habeas corpus* directed to him (*n*).

A prerogative writ.

**93.** The writ of *habeas corpus ad subjiciendum*, unlike the other writs of *habeas corpus*, is a prerogative writ, that is to say, it is not a writ ministerially directed, but is one of the extraordinary remedies known as prerogative writs, which are issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate (*o*). It is also a writ of right (*p*), and is grantable *ex debito justitiæ* (*q*). Though it is a writ of right it is not a writ of course. Both at common law and under the Habeas Corpus Act, 1679 (*r*), the writ of *habeas corpus* is grantable only upon reasonable ground for its issue being shown (*s*). But a writ which issues on a

A writ of right, but not of course.

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*Darnel's Case, supra*, in the reign of Charles I., a writ of *habeas corpus* was granted on motion to test the legality of imprisonment "by the special command of His Majesty," and upon the return in the Court of King's Bench, HYDE, C.J., said: "Whether the commitment be by the King or others, this court is a place where the King doth sit in person, and we have power to examine it; and if it appears that any man hath injury or wrong by his imprisonment, we have power to deliver and discharge him; if otherwise he is to be remanded by us to prison again" (*ibid.*, at p. 4). In *R.* v. *Browne, Corbet and Others* (1686), 2 Show. 484, it was held that a warrant of commitment under the royal sign manual, that is, under the King's own hand without seal, or under the hand of any Secretary or officer of State, was bad, and the Court of King's Bench would discharge the party on *habeas corpus*.

(*n*) In *R.* v. *Ferrers (Earl)* (1758), 1 Burr. 631, it was held that if a peer refuse to obey a writ of *habeas corpus* an attachment may be granted; see also 2 Hawk. P. C., c. 22, s. 33; *R.* v. *Ferrers (Earl)*, *supra*, at p. 634; and see Standing Order No. 79 of 8th June, 1757; May, Parliamentary Practice, 11th ed. (1906), p. 119.

(*o*) *R.* v. *Cowle* (1759), 2 Burr. 834, *per* Lord MANSFIELD, C.J., at p. 855; see also *Crowley's Case* (1818), 2 Swan. 1, *per* Lord ELDON, L.C., at p. 48; Corner, Crown Office Practice, p. 110.

The common law regards the King as the source or fountain of justice, and certain ancient remedial processes of an extraordinary nature which are known as prerogative writs have from the earliest times issued from the Court of King's Bench in which the Sovereign was always present in contemplation of law. The prerogative writs were issued only upon cause shown, as distinguished from the original or judicial writs which commence suits between party and party and which issue as of course (see cases cited *supra*). The Court of King's Bench retained all the jurisdiction of the *Curia Regis* in so far as it was not distributed among the courts, and this jurisdiction, including the granting of the prerogative remedies, is now under the Judicature Acts vested in the High Court of Justice (see title COURTS, Vol. IX., p. 54). *Habeas corpus*, it has been said, is in the nature of a writ of error (*Bushel's Case* (1674), 1 Mod. Rep. 119, *per* HALE, C.J.).

(*p*) *R.* v. *Heath* (1744), 18 State Tr. 1, *per* MARLAY, C.J., at p. 19. "*Habeas corpus* is a writ of right, the highest writ the party can bring" (*Bushel's Case, supra, per* HALE, C.J.). "There is this difference between a *habeas corpus ad subjiciendum* and any other *habeas corpus*, that the former is a writ of right against which no privilege of person or place can avail" (Bac. Abr. tit. Habeas Corpus (B), 6; *R.* v. *Pell* (1674), 3 Keb. 279).

(*q*) *R.* v. *Cowle, supra, per* Lord MANSFIELD, C.J., at p. 855; *Crowley's Case, supra, per* Lord ELDON, L.C., at pp. 48, 61; *Hobhouse's Case* (1820), 3 B. & Ald. 420, *per* ABBOTT, C.J., at p. 421; *Ex parte Knight* (1836), 2 M. & W. 106; *Re Newton* (1849), 13 Q. B. 716. "There is no such thing in law as writs of grace and favour issuing from the judges; they are all writs of right, but they are not all writs of course" (Wilm. 87).

(*r*) 31 Car. 2, c. 2.

(*s*) In answer to a question put by the House of Lords in 1758 whether in

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probable cause, verified by affidavit, is as much a writ of right as a writ which issues of course (*t*).

Remedial, not punitive.

**94.** It is a writ of a remedial nature (*a*), and is not to be used as an instrument of punishment. It is inapplicable if the illegal detention has ceased before the application for the writ is made. When it is clear that the person charged with unlawfully detaining another, whether a child or an adult, has *de facto* ceased to have any custody or control, the writ ought not to issue (*b*). Where, however, a counterfeited release has taken place, and a pretended ignorance of the place of custody or of the identity of the custodian is insisted on, a court may, and ought to, examine into the facts, because the detention is in fact being continued by someone who is really the agent of the original wrong-doer (*c*).

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cases not within the Habeas Corpus Act, 1679 (31 Car. 2, c. 2), writs of *habeas corpus ad subjiciendum* by the law as it then stood ought to issue of course upon probable cause verified by affidavit, WILMOT, C.J., stated that writs of *habeas corpus* ought not to issue of course, and that a writ which issues on a probable cause verified by affidavit is as much a writ of right as a writ which issues of course (Wilm. 81); he also pointed out that writs of *habeas corpus* upon imprisonment for criminal matters were never writs of course, they always issued upon a motion grafted on a copy of the commitment, and cases might be put in which they ought not to be granted (*ibid.*, at p. 88); an early case in which a *habeas corpus* was refused is cited (1688) in Comb. at p. 74). It is clear that at common law *habeas corpus*, though a writ of right, was not grantable as of course, but issued only on cause shown; see the cases cited in note (*q*), p. 41, *ante*; see also *Hobhouse's Case* (1820), 3 B. & Ald. 420, *per* ABBOTT, C.J., at p. 421. It has been doubted whether in the case of applications for *habeas corpus* made to a judge during the vacation the writ is grantable of course by virtue of the Habeas Corpus Act, 1679 (31 Car. 2, c. 2). On this point, see *Hobhouse's Case*, *supra*, *per* ABBOTT, C.J., at p. 422.

(*t*) Wilm. 81; 3 Bl. Com. p. 132; *Anon.* (1671), Cart. 221, *per* VAUGHAN, C.J.: "*Habeas corpus* is no original writ, and if it be in the nature of a judicial writ, there must be a cause for it." The prerogative writs issuing only upon cause shown, and not of course, are therefore distinguishable from original or judicial writs which initiate suits between party and party; see *R.* v. *Cowle* (1759), 2 Burr. 834, *per* Lord MANSFIELD, C.J., at p. 855.

(*a*) See Wilm. 88; *Brass Crosby's Case* (1771), 3 Wils. 188, *per* DE GREY, C.J., at p. 198.

(*b*) *Barnardo* v. *Ford*, *Gossage's Case*, [1892] A. C. 326.

(*c*) *Ibid.* If, as was formerly supposed (*R.* v. *Barnardo* (1889), 23 Q. B. D. 305, C. A., *per* LINDLEY, L.J., at p. 315; *R.* v. *Barnardo*, *Gossage's Case*, (1890), 24 Q. B. D. 283, C. A., *per* Lord ESHER, M.R., at p. 294), the writ could be issued, notwithstanding the termination of the illegal detention, it would be capable of being used as a convenient process for punishing a gaoler who has connived at the escape of one of the prisoners under his charge. As was pointed out by Lord WATSON (*Barnardo* v. *Ford*, *Gossage's Case*, *supra*, at p. 334), "there is no difference in principle between the case of a gaoler so misconducting himself and the case of a man who unlawfully parts with the custody of an infant. If such a person be ordered to recover the custody and to place the party at the disposal of the court, it may possibly necessitate the employment by him of agents and detectives and the application to foreign courts which would in effect be imposing penalties upon him in respect of his breach of duty. In such a case a legal wrong has been committed, but that wrong is the very reverse of illegal detention, for which alone the writ of *habeas corpus* was intended as a remedy."

A man who parts with the custody of a child after he is served with a writ of *habeas corpus*, or who evades service in order that he may get rid of such

(ii.) *Jurisdiction.*

Jurisdiction at common law.

**95.** The right to the writ is a right which exists at common law independently of any statute, though the right has been confirmed and regulated by statute (*d*). At common law the jurisdiction to award the writ was exercised by the Courts of King's Bench, Chancery, and Common Pleas, and, in a case of privilege, by the Court of Exchequer (*e*). This jurisdiction is now exercised by the King's Bench Division and the judges of the High Court of Justice (*f*).

Statutory jurisdiction.

**96.** The grant and issue of the writ have been regulated by various statutes, though the right to the writ is essentially a common law right. The statute 16 Car. 1, c. 10, s. 6 (*g*), gives to any person restrained of his liberty or suffering imprisonment by command of the King or of his Privy Council the right, upon demand or motion made in open court, to the immediate issue of a writ of *habeas corpus* to be directed to the gaoler or other person in whose custody he may be. The person to whom the writ is directed must, at the return to the writ, produce in open court the body of the party so committed or restrained, and must then certify the true cause of his detainer or imprisonment. Within three days after such return the court must proceed to examine and determine whether the cause of such commitment appearing upon the return is just and legal or

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custody, commits a plain contempt for which he is answerable to the court. In such a case it is doubtful whether it is competent, and it is certainly inexpedient, to enforce the writ of *habeas corpus de plano*. The case ought rather to be dealt with as one of contempt, and the court has power to pronounce an order which will compel the guardian custodian to choose between placing himself in a position which will make him liable to the writ and bearing the consequences of his contumacy. On the other hand, where a person absolutely gives up the custody and control of a child from the mere apprehension that by retaining it he may become liable to a writ of *habeas corpus* and without any notice that such a proceeding will be taken, apparently no contempt has been committed (*ibid.*).

(*d*) *Ex parte Besset* (1844), 6 Q. B. 481.

(*e*) Bac. Abr. tit. Habeas Corpus (B), 1; 2 Co. Inst. 55; 3 Bl. Com. 129 *et seq.* The writ of *habeas corpus*, being a high prerogative writ, at common law issued out of the Court of King's Bench, not only in term time but also during vacation (*R.* v. *Shebbeare* (1758), 1 Burr. 460). If issued in vacation it was usually returnable before the judge who awarded it, and he proceeded himself thereon (see the case of a writ directed to Berwicke in 43 Eliz., cited 2 Burr. 856), unless the term intervened, in which case it might be returned into court (*R.* v. *Mead* (1758), 1 Burr. 542; *R.* v. *Clarke* (1758), 1 Burr. 606).

(*f*) The jurisdiction of the old courts of common law is now under the Judicature Acts vested in the King's Bench Division of the High Court of Justice; see title COURTS, Vol. IX., pp. 52, 61.

(*g*) This statute, intituled "an Act for the regulating of the Privy Council, and for taking away the court commonly called the Star Chamber," recites the provisions of Magna Charta and the statutes of the reign of Edward III. relating to the liberty of the subject. The statute, which is still in force, was intended further to secure the liberty of the subject by regulating the issue of the writ in the particular cases of infringement of the right of personal security at the hands of the King or of the Privy Council, and was necessitated by the cases of arbitrary imprisonment, which were very prevalent at the date of the statute; see, for instance, *Darnel's Case* (1627), 3 State Tr. 1.

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not, and must deliver, bail, or remand the prisoner accordingly, under penalty of treble damages forfeitable to the party aggrieved.

Habeas Corpus Act, 1679 (Criminal Cases).

**97.** The Habeas Corpus Act, 1679 (*h*), was passed "for the better securing the liberty of the subject." This is effected by specifically meeting the various devices by which the common law right to the writ had hitherto been evaded, and, in particular, by making the writ readily accessible during the vacation, by obviating the necessity for the issue of a second and third writ known as an *alias* and *pluries*, by imposing penalties for the refusal of the writ, and, generally, by regulating the granting and issue of the writ and the procedure upon its return.

By this statute any person committed or detained in the vacation for any crime, except for felony or treason plainly expressed in the warrant of commitment, or anyone in his behalf, may apply to the Lord Chancellor, or any judge of the High Court of Justice, who, upon view of the copy of the warrant of commitment, or upon oath made that such copy was denied by the gaoler, is, under penalty, required, upon the request in writing by the person detained or anyone on his behalf, attested and subscribed by two witnesses, to award a *habeas corpus* under the seal of the court of which he is a judge, returnable immediately before himself (*i*).

Suspension of Habeas Corpus Act.

**98.** The operation of the Habeas Corpus Act, 1679 (*h*), has at various periods been temporarily suspended by the legislature on the ground of urgent political necessity. Such suspension has usually been effected by a statute enabling persons to be arrested on suspicion of treasonable practices, or certain other crimes of a political nature, and detained in custody without bail or trial, notwithstanding any law to the contrary. Such an enactment, while it remains in force, in no sense abrogates or suspends the general right to the writ at common law (*k*).

Habeas Corpus Act, 1816 (Non-Criminal Cases).

**99.** As the Habeas Corpus Act, 1679 (*l*), applied only to cases where persons were detained in custody for some criminal or supposed criminal matter, the benefit of its provisions in facilitating the issue of the writ did not extend to cases of illegal deprivation of liberty otherwise than on a criminal charge, as, for example, where children were unlawfully detained from their parents or guardians by persons who were not entitled to their custody, where a person was wrongfully kept under restraint as a lunatic, or where a person was illegally kept in confinement by another. In all such cases the issue of the writ during vacation depended solely upon the common law, and remained unregulated by statute until the year 1816, when

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(*h*) 31 Car. 2, c. 2. The writ in modern times is almost invariably issued by virtue of the common law jurisdiction, and not under the statute.

(*i*) *Ibid.*, s. 2.

(*k*) These so-called Suspending Acts operate in effect as a temporary suspension of the rights of the subject with regard to bail and speedy trial in the case of the specific offences which are enumerated in the Suspending Act, but the common law right to the writ of *habeas corpus* in all other cases remains unaffected.

(*l*) 31 Car. 2, c. 2.

by the Habeas Corpus Act, 1816 (*a*), any person confined or restrained of his liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit) within England and Wales, the town of Berwick-upon-Tweed or the isles of Jersey, Guernsey, or Man, or in Ireland, upon complaint made to the court by him or on his behalf, supported by affidavit or affirmation (in cases where by law an affirmation is allowed) that there is a probable and reasonable ground for such complaint, is entitled in vacation time to a writ of *habeas corpus ad subjiciendum* under the seal of the court, to be directed to the person or persons in whose custody or power he may be, returnable immediately before the person awarding the writ or before any other judge of the court issuing the writ.

Places to which writ may be granted.

**100.** The writ of *habeas corpus* lies to any part of the dominions of the Crown (*b*), including Ireland, Berwick-upon-Tweed, the Isle of Man, the Channel Islands, and the Colonies (*c*). It does not run in Scotland (*d*).

Under the Habeas Corpus Act, 1679 (*e*), the writ may be directed and run into any County Palatine, the Cinque Ports, or other privileged places within England, Wales, or the town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey, any law or usage to the contrary notwithstanding.

Under the Habeas Corpus Act, 1816 (*f*), the writ within the meaning of that Act may be directed and run into any County Palatine, Cinque Port or any other privileged place within England, Wales, Berwick-upon-Tweed and the isles of Jersey, Guernsey and Man, and also into any port, harbour, road, creek, or bay upon the coast of England or Wales, although the same should be out of the body of any county; and if such writ shall issue in Ireland it may be directed and run into any port, harbour, road, creek, or bay

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(*a*) 56 Geo. 3, c. 100, s. 1.

(*b*) See 2 Roll. Abr. 69; *Bourn's Case* (1619), Cro. Jac. 543; *R.* v. *Pell* (1674), 3 Keb. 279.

(*c*) See *R.* v. *Cowle* (1759), 2 Burr. 834, at p. 855. At common law the writ lay to Calais at the time when that place was a British possession (*Bourn's Case, supra*, as reported at Palm. 54); to Jersey and Guernsey (*Anon.* (1681), 1 Vent. 357; *R.* v. *Overton* (1669), 2 Keb. 450; *R.* v. *Salmon* (1669), 2 Kel. 450); to Upper Canada (*Re Anderson* (1861), 30 L. J. (Q. B.) 129; *Re Belson* (1850), 7 Moo. P. C. C. 114; *Dodd's Case* (1857), 2 De G. & J. 510; *Wilson's* (*Carus*) *Case* (1845), 7 Q. B. 984, *per* Lord DENMAN, C.J., at p. 998); to the Cinque Ports (*Bourn's Case, supra; ibid.* (1620), Palm. 96); to Ireland (*Anon.* (1681), 1 Vent. 357); to Berwick-upon-Tweed (*Bourn's Case* (1619), Cro. Jac. 543); to a County Palatine (*Jobson's Case* (1626), Lat. 160; *R.* v. *Pell* (1674), 3 Keb. 279; Bac. Abr. tit. Habeas Corpus (B), (6)); to Canada (*Ex parte Anderson* (1861), 3 E. & E. 487), where a writ of *habeas corpus* was issued by the Court of King's Bench into Canada, and the jurisdiction of the English courts to issue the writ to colonies and foreign dominions of the Crown was considered and affirmed.

(*d*) See *R.* v. *Cowle* (1759), 2 Burr. 834, *per* Lord MANSFIELD, C.J., at p. 856. Until the accession of James I. in 1603, when the Crowns of England and Scotland were united, Scotland was regarded by the common law as a foreign dominion to which the prerogative writs would not lie, and the writ of *habeas corpus* is unknown to the law of Scotland (*ibid.*).

(*e*) 31 Car. 2, c. 2, s. 10.

(*f*) 56 Geo. 3, c. 100, s. 5.

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although the same should not be in the body of any county, any law or usage to the contrary in anywise notwithstanding.

*Habeas corpus* in the colonies.

The Habeas Corpus Act, 1862 (*g*), enacts that no writ of *habeas corpus* shall issue out of England by authority of any English judge or court of justice into any colony or foreign dominion of the Crown where the Crown has a lawfully established court or courts of justice having authority to grant and issue the writ and to ensure its due execution throughout such colony or dominion.

The writ may still issue from the English courts to the Isle of Man, that island not being a foreign dominion of the Crown within the meaning of the statute (*h*).

Against persons abroad.

**101.** The writ of *habeas corpus* cannot be issued against a person who is abroad, it being issuable only for immediate service on a person who is within the jurisdiction at the date of the issue (*i*); nor against a person who is on board a public vessel of war of a foreign State though in British waters (*k*); nor in respect of an alien

(*g*) 25 & 26 Vict. c. 20.

(*h*) *Re Brown* (1864), 33 L. J. (Q. B.) 193; *Ex parte Crawfurd* (1849), 13 Q. B. 613.

(*i*) *R.* v. *Pinckney*, [1904] 2 K. B. 84, C. A., where it was also held that the writ cannot be ordered to lie in the office until the respondent comes within the jurisdiction. See also *Bourn's Case* (1619), Cro. Jac. 543; *R.* v. *Cowle* (1759), 2 Burr. 834; *Barnardo* v. *Ford*, *Gossage's Case*, [1892] A. C. 326.

In *Ex parte Wyatt* (1836), 5 Dowl. 389, a writ of *habeas corpus* to bring up the body of an infant was issued directed to a Colonel Rochfort and was served upon him personally in Paris, an application having been previously made to the French authorities, who had recognised the writ and allowed its execution. On an application for a rule absolute for attachment of the colonel for disobedience to the writ the English courts offered to grant a rule *nisi* on a new writ of *habeas corpus*. The question of jurisdiction to issue the writ against a person abroad was not raised, but it was pointed out by PATTESON, J. (*ibid.*, at p. 391), that the only effect which the proceedings of the French tribunal could have upon the service of the writ was to render it equivalent to personal service, and that the French law could not give the writ any greater effect, nor the court any more authority, than it otherwise had.

(*k*) This exemption results from the doctrine of international law as to the exterritoriality of public armed vessels of a Sovereign within the territorial waters of another State, whereby the vessel is regarded as protecting the persons on board her from both civil and criminal jurisdiction of the local tribunals.

The *Sitka*, a vessel captured by England from Russia in 1856, entered San Francisco with a prize crew and some Russian prisoners on board. An application was made on behalf of the prisoners to the Californian courts for a writ of *habeas corpus*. The writ was issued and served, and the *Sitka* thereupon left San Francisco and disregarded the writ. Mr. Cushing, the attorney-general of the United States, advised his Government that the courts of the United States had "adopted unequivocally the doctrine that a public ship of war of a foreign Sovereign at peace with the United States coming into our ports and demeaning herself in a friendly manner is exempt from the jurisdiction of the country. She remains a part of the territory of her Sovereign . . . The ship which the captain of the *Sitka* commanded was a part of the territory of his country; it was threatened with invasion from the local courts, and, perhaps, it was not only lawful, but highly discreet in him to depart and avoid unprofitable controversy" (Wheaton, Elements of International Law, 4th ed., Part II., ch. 2, s. 100; Hall, International Law, 3rd ed., p. 189; Woolsey, International Law, ss. 58, 68; see also Opinion of Sir R. Phillimore and Mr. Bernard, 1879 ed., Report of Fugitive Slave Commission, p. xxvi; Memorandum by Cockburn, C.J., *ibid.*, xxxvi.; Letter of Historicus in *Times*, November 4th, 1875, quoted *ibid.*, p. lxii.).

detained, in this country, in a foreign embassy or legation of the country to which he belongs (*l*).

Criminal cases.

**102.** The writ will not be granted to persons committed for felony or treason plainly expressed in the warrant of commitment (*m*), or to persons convicted or in execution under legal process (*n*), including persons in execution of a legal sentence after conviction on indictment in the usual course (*o*); or to an alien enemy who is a prisoner of war (*p*); or to a party to a suit, who is in lawful custody, to enable him to appear in court for the purpose of arguing his case in person (*q*), or to enable him to move to set aside a writ of attachment on which he is in custody (*r*), unless it appears that without his personal attendance substantial justice could not be done (*s*), or to enable him to move for or show cause against a rule (*t*).

Reviewing decision.

**103.** The writ of *habeas corpus* will not be granted where the effect of it would be to review the judgment of one of the superior courts which might have been reviewed on writ of error (*a*); or

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(*l*) *Re Sun Yat* (1896), October 29th, cited in Short and Mellor, Crown Office Practice, 2nd ed. (1908), p. 318, where WRIGHT, J., at chambers, refused an application for a writ of *habeas corpus* on behalf of a Chinese subject who was alleged to be detained against his will in the Chinese Legation in London. The immunity from the writ in such a case is based on diplomatic privilege; see title CONSTITUTIONAL LAW, Vol. VI., p. 428; and the remedy would apparently be by means of diplomatic representation.

(*m*) Habeas Corpus Act, 1679 (31 Car. 2, c. 2), s. 2. As to the right of persons committed for felony or treason to bail, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 323; see also p. 51, *post*.

(*n*) *Ibid.*

(*o*) *Ex parte Lees* (1858), E. B. & E. 828; see also 2 Roll. Rep. 138; 3 Bl. Com. 130.

(*p*) *Three Spanish Sailors' Case* (1779), 2 Wm. Bl. 1324, where it was held that three Spanish seamen on behalf of whom an application for the writ was made, being on their own showing alien enemies and prisoners of war, were not entitled to be set at liberty on *habeas corpus;* and it was said that no *habeas corpus* lies for an alien enemy a prisoner of war, however ill-used or deceived; *R.* v. *Schiever* (1759), 2 Burr. 765, where application was made for a writ of *habeas corpus* on behalf of a Swede who had been taken prisoner in war on board an enemy's ship and who was alleged to have been forced into the enemy's service, and it was held that *habeas corpus* does not lie to remove prisoners of war, and that the fact of the prisoner being a subject of a nation not at war did not alter the case.

(*q*) Where a married woman who was in Holloway Gaol under a sentence of six months imprisonment for libel applied for a *habeas corpus* to enable her to appear in court to argue in person a rule for a new trial, POLLOCK, B., at chambers, refused to grant the writ, and an appeal from his decision was dismissed (*Weldon* v. *Neal* (1885), 15 Q. B. D. 471).

(*r*) *Ford* v. *Nassau* (1842), 9 M. & W. 793; *Newton* v. *Askew* (1848), 6 Hare, 319.

(*s*) *Clark* v. *Smith* (1847), 3 C. B. 982, 984; *Ex parte Dunn* (1847), 5 C. B. 215; *Ex parte Cobbett* (1848), 5 C. B. 418.

(*t*) *Benns* v. *Mosley* (1857), 2 C. B. (N. S.) 116; *A.-G.* v. *Hunt* (1821), 9 Price, 147; *R.* v. *Parkyns* (1820), 3 B. & Ald. 668, at p. 679, n. (a).

(*a*) *Re Dunn* (1847), 17 L. J. (C. P.) 97. Writ of error has now been abolished by s. 20 (1) of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), which constituted a Court of Criminal Appeal and created a right of appeal in the case of conviction on indictment; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 432.

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where it would falsify the record of a court which shows jurisdiction on the face of it (*b*). As a general rule, some probable ground for relief must be shown (*c*).

A member of the House of Commons committed by the House for breach of privilege cannot during the session obtain his discharge by means of *habeas corpus* (*d*).

Where a person who is not a member is committed by the House of Commons (*e*), or by the House of Lords (*f*), for breach of privilege the courts will not review the committal or grant a discharge on *habeas corpus;* for if the return show that the committal was for contempt of either House of Parliament the courts have no power to investigate the alleged contempt (*g*).

A person committed for contempt by order of either House of Parliament may be discharged on *habeas corpus* after a dissolution or prorogation of Parliament (*h*).

(iii.) *Purposes for which Habeas Corpus is granted.*

General.

**104.** The remedy by *habeas corpus* is equally available in criminal and civil cases, provided that there is a deprivation of personal liberty without legal justification (*i*).

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(*b*) See *Ex parte Newton* (1855), 24 L. J. (C. P.) 148.

(*c*) See p. 41, *ante;* 3 Bl. Com. 130: "So that if it issued of mere course without showing to the court or a judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier, a mariner in the King's service, a child, relation, or a domestic, confined for insanity or other prudential reasons, might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court, and therefore Sir EDWARD COKE, C.J., did not scruple to deny a *habeas corpus* to one confined by the Court of Admiralty for piracy, there appearing upon his own showing sufficient grounds to confine him"; see also 2 Roll. Rep. 138.

In the case, however, of an application for a writ of *habeas corpus* to a judge during vacation under s. 9 of the Habeas Corpus Act, 1679 (31 Car. 2, c. 2), it has been suggested that the writ is grantable as of course (see *Hobhouse's Case* (1820), 3 B. & Ald. 420, *per* BEST, J., at p. 424), but this seems very doubtful (see *ibid., per* ABBOTT, C.J., at p. 422, and *ibid., per* HOLROYD, J., at p. 423; see also note (*s*), p. 41, *ante*).

(*d*) *Brass Crosby's Case* (1771), 2 Wm. Bl. 754; *Burdett* v. *Abbot* (1811), 14 East, 1.

(*e*) *Hobhouse's Case, supra.*

(*f*) *R.* v. *Flower* (1799), 8 Term Rep. 314.

(*g*) *Sheriff of Middlesex's Case* (1840), 11 Ad. & El. 273. In that case a writ of *habeas corpus* was granted requiring the Sergeant-at-Arms of the House of Commons to bring before the court two persons who had been committed by the House. The return showed that the Sergeant-at-Arms detained the prisoners on a warrant directed to him by the Speaker, which set forth that the prisoners "having been guilty of a contempt and breach of the privileges of this House" were committed to the custody of the Sergeant-at-Arms. It was held that the warrant was not bad for omitting to state the grounds on which the parties had been adjudged guilty of contempt; that the Court of Queen's Bench could not inquire by affidavit into the merits of the commitment even if the case were within the Habeas Corpus Act, 1816 (56 Geo. 3, c. 100), although in affidavits on which the writ was issued it was sworn that the parties were in fact committed for executing process in obedience to rules of that court and that the warrant was sufficiently certain. See also *Burdett* v. *Abbot, supra.*

(*h*) *Streeter's Case* (1654), Sty. 415; *Shaftsbury's (Earl) Case* (1677), 1 Mod. Rep. 144; *Sheriff of Middlesex's Case, supra.*

(*i*) See p. 40, *ante.*

Many of the purposes to which the writ has been applied in the past are rather of historical interest than of present importance. Thus, aliens who have been brought to this country in a condition of slavery have attained freedom by means of *habeas corpus* (*k*).

In modern practice the purposes to which the writ is most frequently applied are (1) the testing of the regularity of commitments (*l*), and particularly in cases of the commitments for extradition (*m*) and of fugitive offenders (*n*); and (2) the investigation of the right to the custody of infants (*o*).

Illegal commitment.

**105.** A person who is in custody under a warrant or order of commitment may test the validity of the warrant or order under which he is detained by means of the writ of *habeas corpus* (*p*), as,

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(*k*) *Sommersett's Case* (1772), 20 State Tr. 1, where a negro slave who had been purchased in Virginia and brought to England and there forcibly detained as a slave was held entitled to be discharged upon *habeas corpus*. In that case, the slave had been brought to this country by his master, and having here escaped from the service of his master, the negro refused to return to him, and was forcibly seized by persons employed by his former master and carried on board a ship bound for Jamaica; but he subsequently regained his freedom by means of the writ of *habeas corpus*, which was applied for by friends on his behalf (see also *Shanley* v. *Harvey* (1762), 2 Eden, 126). In *Slave Grace's Case* (1827), 2 Hag. Adm. 94, a slave who had been brought to this country, subsequently, of her own free will, went abroad with her owner, and on proceedings on *habeas corpus* it was held that by returning voluntarily to a country where slavery was recognised as legal she had reverted to her former condition of slavery. In *Hottentot Venus's Case* (1810), 13 East, 195, a rule for a writ of *habeas corpus* was granted upon the allegation that an ignorant and helpless foreigner had been brought to this country and exhibited against her consent by those in whose keeping she was.

In *Re Gootoo and Inyokwana* (*Infants*) (1891), 35 Sol. Jo. 481, a rule for a writ of *habeas corpus* was obtained at the instance of the secretary of the British and Foreign Anti-Slavery Society upon the allegation that two boys of the age of twelve, natives of Swaziland or of some adjoining country outside British territory, had been brought to England by a British subject, who was about to take them back with him to Swaziland; but there being no evidence that they would there be placed in a state of slavery the rule was discharged; though on a subsequent application, upon funds being provided for their maintenance, a guardian was appointed so as to secure that there would be someone within the jurisdiction to protect their interests.

The writ of *habeas corpus* was formerly used as a means of securing freedom in cases of illegal imprisonment for the naval or military forces of the Crown, but impressment, though within certain limits legal as a means of recruiting in the case of the navy and based on the royal prerogative, is no longer resorted to; see *R.* v. *King* (1694), Comb. 245; *Ex parte Fox* (1793), 5 Term Rep. 276; *Ex parte Grocot* (1825), 5 Dow. & Ry. (K. B.) 610; *Ex parte Harrison* (1805), 2 Smith, K. B. 408. See alse title ROYAL FORCES.

(*l*) See *infra*.

(*m*) See p. 50, *post*.

(*n*) See p. 51, *post*.

(*o*) See p. 52, *post*.

(*p*) As illustration of cases in which the regularity of commitments has been tested on *habeas corpus*, see *Ex parte Allen* (1834), 3 Nev. & M. (K. B.) 35; *R.* v. *Bowen* (1840), 9 C. & P. 509; *Re Dunn* (1847), 5 C. B. 215; *Newton's Case* (1849), 13 Q. B. 716; *R.* v. *Lees* (1858), 27 L. J. (Q. B.) 403; *Ex parte Cross* (1857), 2 H. & N. 354; *Re Timson* (1870), L. R. 5 Exch. 257; *A.-G. for the Colony of Hong Kong* v. *Kwok-a-Sing* (1873), L. R. 5 P. C. 179; *R.* v. *Mount* (1875), L. R. 6 P. C. 283; *Cox* v. *Hakes* (1890), 15 App. Cas. 506. As to the essentials to the validity of a warrant or an order of commitment, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 322; MAGISTRATES.

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for instance, where he is imprisoned under the sentence of a naval, military (*q*), or ecclesiastical court (*r*).

Upon the return to a writ of *habeas corpus* in a case of alleged irregularity in the commitment the court exercises its jurisdiction as follows: If it appears clearly that the act for which the party is committed is no crime, or that it is a crime, but he is committed for it by a person who has no jurisdiction, the court discharges him. If it is doubtful whether the act is a crime or not or whether the party be committed by a competent jurisdiction, or if it appears to be a crime, but a bailable one, the court bails him. If the offence is not a bailable one and the prisoner is committed by a competent jurisdiction, the court remands or commits him (*s*).

Where the validity of any warrant, commitment, order, conviction, inquisition or record is to be questioned, no order for the issue of a writ of *habeas corpus* will be granted, unless at the time of moving a copy of such warrant, commitment etc., verified by affidavit, be produced and handed to the officer of the court before the motion be made, or the absence thereof accounted for to the satisfaction of the court (*t*).

When a writ of *habeas corpus* has been granted in respect of an informal or illegal commitment it is the practice for the solicitor to the applicant to give notice to the committing magistrates and to the prosecutor, reciting the granting of the writ and requiring them to take notice that by virtue of the writ the person in custody will be brought before the court or before a judge at chambers at the Royal Courts of Justice, London, on the day and at the hour specified, in order that he may be discharged out of custody as to the commitment by which he is detained in the custody of the gaoler (*u*).

Extradition.

**106.** A person who has been committed by a magistrate on the application of a foreign Government for extradition in respect of an offence committed abroad has a right to apply for a writ of *habeas corpus* for the purpose of testing the validity of his commitment (*a*).

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(*q*) *Wolfe Tone's Case* (1798), 27 State Tr. 614; *R.* v. *Suddis* (1801), 1 East, 306; *Re Douglas* (1842), 3 Q. B. 825; *R.* v. *Cuming, Ex parte Hall* (1887), 19 Q. B. D. 13. In *Blake's Case* (1814), 2 M. & S. 428, a writ of *habeas corpus* was granted on the allegation that a person under military arrest had not been specially tried by court-martial pursuant to military law.

(*r*) *Cox* v. *Hakes* (1890), 15 App. Cas. 506, where a clerk in holy orders had been arrested and imprisoned for contumacy under a writ *de contumace capiendo*, and a writ of *habeas corpus* was granted by the Queen's Bench Division (*Ex parte Cox* (1887), 19 Q. B. D. 307); but the House of Lords reversed the order of the Court of Appeal making the rule absolute (20 Q. B. D. 1).

(*s*) See p. 51, *post*.

(*t*) Crown Office Rules, 1906, r. 22. For form of affidavit verifying certified copy of commitment, see *ibid.*, Appendix, Form No. 172. For form of gaoler's certificate to be written at the foot of the commitment, see *ibid.*, Form No. 173.

(*u*) For form of notice on having obtained writ of *habeas corpus ad subjiciendum* on an informal or illegal commitment, see *ibid.*, Form No. 178.

(*a*) Applications for the writ of *habeas corpus* in extradition cases are of frequent occurrence in modern practice. See *Ex parte Bouvier* (1872), 12 Cox, C. C. 303; *Ex parte Counhaye* (1873), 42 L. J. (Q. B.) 217; *Ex parte Wilson* (1877), 3 Q. B. D. 42; *R.* v. *Lavaudier* (1881), 15 Cox, C. C. 329; *R.* v. *Ganz* (1882), 9 Q. B. D. 93; *R.* v. *Weil* (1882), 9 Q. B. D. 701; *R.* v. *Maurer*

It is the duty of a police magistrate when committing a prisoner for extradition to inform him that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus* (*b*). The period of fifteen days may be extended by the Secretary of State (*c*).

No one may be surrendered for extradition in respect of an offence which is of a political character (*d*), and when a magistrate commits a prisoner for extradition his decision that the offence charged is not of a political character may be reviewed by the High Court on an application for a writ of *habeas corpus* (*e*).

Fugitive offenders.

**107.** A person who has been committed to prison until his return under the Fugitive Offenders Act, 1881 (*f*), in respect of an offence committed in some part of the dominions of the Crown or in some foreign country in which the Crown has jurisdiction, is entitled to apply for a writ of *habeas corpus* for the purpose of testing the validity of the magistrate's order for his return (*g*). This right is not affected by the fact that the fugitive has been released on bail pending his return, and is consequently under no immediate personal restraint (*h*).

The magistrate who commits a fugitive offender to prison with a view to his return under the Fugitive Offenders Act, 1881 (*i*), must inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus* (*k*).

Admission to bail.

**108.** The remedy at common law for the improper refusal of bail was by writ of *habeas corpus* (*l*).

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(1883), 10 Q. B. D. 513; *Re Woodhall* (1888), 57 L. J. (M. C.) 71, C. A.; *Re Castioni*, [1891] 1 Q. B. 149; *Re Meunier*, [1894] 2 Q. B. 415; *Re Galwey*, [1896] 1 Q. B. 230; *Re Arton*, [1896] 1 Q. B. 108; *Re Arton* (No. 2), [1896] 1 Q. B. 509; *Re Bluhm*, [1901] 1 K. B. 764; *Re Borovsky, Ex parte Salaman*, [1902] 2 K. B. 312; *Re Siletti, R.* v. *Holloway Prison* (*Governor*) (1902), 71 L. J. (K. B.) 935; *R.* v. *Vyner* (1903), 68 J. P. 142; *R.* v. *Zossenheim* (1903), 20 T. L. R. 121; *Re Van der Auwera, R.* v. *Brixton Prison* (*Governor*), [1907] 2 K. B. 157; *R.* v. *Brixton Prison* (*Governor*), *Ex parte Calberla*, [1907] 2 K. B. 861; and title EXTRADITION AND FUGITIVE OFFENDERS.

(*b*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3.

(*c*) *Ibid.*, s. 11. For the law and practice relating to the extradition of fugitive criminals, see title EXTRADITION AND FUGITIVE OFFENDERS. It is merely necessary here to state that the subject is regulated by the Extradition Acts, 1870 to 1906 (namely, the Extradition Act, 1870 (33 & 34 Vict. c. 52); the Extradition Act, 1873 (36 & 37 Vict. c. 60); the Extradition Act, 1895 (58 & 59 Vict. c. 33); and the Extradition Act, 1906 (6 Edw. 7, c. 15)), and the various Extradition Treaties with foreign States to which those statutes have from time to time been applied by Orders in Council. The more important decisions on *habeas corpus* in extradition cases are cited in note (*a*), p. 50, *ante*.

(*d*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3 (1).

(*e*) *Re Castioni, supra.*

(*f*) 44 & 45 Vict. c. 69.

(*g*) *R.* v. *Spilsbury*, [1898] 2 Q. B. 615; *R.* v. *Vyner* (1903), 68 J. P. 142.

(*h*) *R.* v. *Spilsbury, supra.* As to the nature of the evidence which justifies the magistrate in making an order for the return of a fugitive offender, see *R.* v. *Brixton Prison* (*Governor*), *Ex parte Percival*, [1907] 1 K. B. 696.

(*i*) 44 & 45 Vict. c 69.

(*k*) *I bid.*; s. 5.

(*l*) 4 Co. Inst. 290. For form of writ of *habeas corpus* to bring up a prisoner to be bailed, see Crown Office Rules, Appendix, Form No. 69; for form of

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There are now two alternative modes of procedure by means of which a prisoner may obtain release on bail. Applications for bail in felony or misdemeanour must in the first instance be made by summons before a judge at chambers for a writ of *habeas corpus*, or to show cause why the defendant should not be admitted to bail either before a judge at chambers or before a justice of the peace in such amount as the judge may direct (*m*).

A magistrate has a discretion as to admitting to bail or refusing bail in certain cases of misdemeanour (*n*), but if bail be refused by the magistrate in cases of misdemeanour the accused is, under the Habeas Corpus Act, 1679 (*o*), entitled to obtain his discharge upon bail by obtaining a writ of *habeas corpus* (*p*).

An exception to the authority of the courts to admit to bail is where the commitment is for a contempt or in execution (*q*). Thus, the courts will refuse *habeas corpus* to admit to bail or to discharge out of custody where a person has been convicted for contempt by the House of Lords or the House of Commons (*r*); for the adjudication that an act is a contempt or breach of privilege amounts to a conviction, and the commitment in consequence is execution (*a*).

Custody of infants.

**109.** A parent, guardian, or other person who is legally entitled to the custody of a child can regain such custody when wrongfully deprived of it by means of the writ of *habeas corpus* (*b*). The

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notice of bail upon *habeas corpus*, *ibid.*, Form No. 74. As to bail generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 323.

(*m*) Crown Office Rules, r. 111. The summons to admit to bail is in modern practice resorted to more frequently than the summons for a writ of *habeas corpus* to bring up the accused, but the latter would be the proper course in the case of the refusal of a magistrate to accept the sureties tendered (see Short and Mellor, Crown Office Practice, 2nd ed. (1908), p. 287).

(*n*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), ss. 21, 23.

(*o*) 31 Car. 2, c. 2, s. 2.

(*p*) *Re Frost* (1888), 4 T. L. R. 757, where the court pointed out that it is a curious anomaly of the law that the magistrate has discretion to refuse bail in certain cases of misdemeanour while the King's Bench Division has no discretion to refuse it on a writ of *habeas corpus*. See also *R.* v. *Bennett* (1870), 49 L. T. Jo. 387, *per* LUSH, J., at p. 388; *R.* v. *Atkins* (1870), 49 L. T. Jo. 421; *R.* v. *Manning* (1888), 5 T. L. R. 139.

(*q*) 4 Bl. Com. 296; 2 Hale, P. C. 133. As to commitment for contempt, see pp. 68, 72, *post*; see also title CONTEMPT OF COURT, Vol. VII., pp. 279—325.

(*r*) *R.* v. *Flower* (1799), 8 Term Rep. 314.

(*a*) *Brass Crosby's Case* (1771), 3 Wils. 188, at p. 199, *per* DE GREY, C.J.; see also *R.* v. *Beardmore* (1759), 2 Burr. 792.

(*b*) *R.* v. *Greenhill* (1836), 4 Ad. & El. 624; *Re Hakewill* (1852), 12 C. B. 223; *R.* v. *Nash* (1883), 10 Q. B. D. 454; *R.* v. *Barnardo, Jones's Case*, [1891] 1 Q. B. 194, C. A.; *Barnardo* v. *McHugh*, [1891] A. C. 388; *R.* v. *New* (1904), 20 T. L. R. 583, C. A. The rules of the common law relating to the custody of infants differed from the rules administered by the Court of Chancery (*Re Goldsworthy* (1876), 2 Q. B. D. 75), the former regarding the strict legal right of the father to the custody of his child (*Re Greenhill* (1836), 4 Ad. & El. 624), the latter paying permanent attention to the benefit of the child (*Re Goldsworthy*, *supra*). The jurisdiction of the courts in such matters is now concurrent (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (10); but in the exercise of the jurisdiction relating to the custody of infants the rules of equity now prevail (*Re Goldsworthy*, *supra*; *Re Brown* (*Ethel*) (1884), 13 Q. B. D. 614; *R.* v. *Gyngall*, [1893] 2 Q. B. 232, C. A.). It is now the established practice in cases where the child

unlawful detention of a child from the person who is legally entitled to its custody is, for the purpose of the issue of the writ, regarded as equivalent to an unlawful imprisonment of the child (*c*). It is, therefore, unnecessary to allege in applying for the writ that any restraint or force is being used towards the infant by the person in whose custody and control it is for the time being (*d*).

Children of foreigners.

**110.** The right of a foreign parent to the custody of his child and his authority over the child while the child is in England is governed by English law (*e*). Where a foreign parent who is resident abroad applies by agent for *habeas corpus* to regain the custody of a child who is living with a relation in England, the courts will not allow the child to be handed over to the father's agent to be taken abroad, unless there be good reason for the father not attending personally to receive him or her (*f*).

A foreign guardian (*g*) has no legal rights as to the custody of his ward while the ward is in this country, though as a matter of international comity the English courts will usually recognise and give effect to the authority of a foreign guardian (*h*).

When parent has parted with possession of child.

**111.** Where a parent has voluntarily parted with the custody of a child by intrusting it to another person, and such person has without the parent's authority handed the child to a third person, a writ of *habeas corpus* will be issued at the instance of the parent, even though the person to whom the child was intrusted alleges that he does not know where the child is; for the parent is entitled to require a return to be made to the writ, so that the facts may be fully investigated (*i*).

Illegitimate child.

**112.** The mother of an illegitimate child is usually entitled to regain the custody of the child on *habeas corpus* (*k*), but the interest of the child will be considered by the court in awarding its custody (*k*). The mother of an illegitimate child has a right to

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has attained an age of discretion for the court or judge to consult the wishes of the child before making an order on *habeas corpus* as to its custody (*R.* v. *Howes* (1860), 30 L. J. (M. C.) 47; *Re Connor, an Infant* (1863), 16 I. C. L. R. 112; *Re Agar-Ellis, Agar-Ellis* v. *Lascelles* (1883), 24 Ch. D. 317, 326, C. A.). As to the guardianship of infants generally, see title INFANTS AND CHILDREN.

(*c*) *R.* v. *Clarke* (1857), 7 E. & B. 186, *per* Lord CAMPBELL, C.J., at p. 193.

(*d*) *Ex parte M'Clellan* (1831), 1 Dowl. 81.

(*e*) *Johnstone* v. *Beattie* (1843), 10 Cl. & Fin. 42, 113, H. L.; and see title CONFLICT OF LAWS, Vol. VI., p. 280.

(*f*) *R.* v. *Scherschewsky* (1892), 8 T. L. R. 571; see also *Re Preston* (1847), 5 Dow. & L. 233. In *R.* v. *Scherschewsky*, *supra*, the children of foreign parents were residing with their mother in England; the English courts on an application by an attorney for a *habeas corpus* at the instance of the father, who was abroad, and who desired to regain the custody of the children, refused to hand them over to an agent of the father to be taken abroad in the absence of valid reason for the father's non-attendance in person to receive them.

(*g*) That is, a guardian appointed under the law of a foreign country.

(*h*) *Johnstone* v. *Beattie*, *supra*; *Stuart* v. *Bute* (*Marquis*) (1861), 9 H. L. Cas. 440; *Nugent* v. *Vetzera* (1866), L. R. 2 Eq. 704.

(*i*) *Barnardo* v. *Ford*, *Gossage's Case*, [1892] A. C. 326, where the House of Lords disapproved the decision in *R.* v. *Barnardo* (1889), 23 Q. B. D. 305, C. A.

(*k*) *R.* v. *New* (1904), 20 T. L. R. 583, C. A. As to the custody of an illegitimate child generally, see title BASTARDY, Vol. II., pp. 440 *et seq.*

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the custody of the child notwithstanding that the child has been adopted by a third party under agreement (*l*).

Husband and wife.

**113.** A husband is at common law entitled to the custody of his wife against all other persons (*m*), and the writ of *habeas corpus* is available to a husband for the purpose of regaining the custody of his wife if she be wrongfully detained by anyone from him without her consent (*n*). He cannot, however, obtain the writ where his wife has left him on account of his ill-usage and cruelty (*o*), or where she lives apart from him by her own wish and is under no restraint (*p*); for a husband has not got such a right to the custody of his wife's person as a father has to the custody of his child, and a wife is entitled to exercise her judgment and discretion as to remaining away from her husband (*q*).

A wife is entitled to a writ of *habeas corpus* directed to her husband if she is wrongfully restrained by him against her will after the execution of a deed of separation (*r*), or if he attempts to enforce restitution of conjugal rights by keeping her in confinement or forcibly detaining her in his custody (*s*).

Detention on ground of insanity.

**114.** The writ may issue at the instance of any person who is wrongfully kept in confinement under the pretence of insanity or lunacy to compel the person having the custody of the alleged lunatic to produce him in court, so that the legality of the detention may be inquired into (*t*), but a strong case must be disclosed before the writ will be granted (*a*). It is essential, therefore, in such a case that there should be an affidavit by the alleged lunatic, or that there should be clear evidence that he is prevented from making an affidavit (*b*).

On an application for a writ in a case where a person is alleged to be detained as a lunatic without justification, the court will usually order the alleged lunatic to be medically examined by an expert, the application being postponed until after the result of the medical examination has been reported (*c*).

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(*l*) *Re O'Hara*, [1900] 2 I. R. 232, C. A.; *Kerrigan* v. *Hall* (1901), 4 F. (Ct. of Sess.) 10; and compare *Humphrys* v. *Polak*, [1901] 2 K. B. 385, C. A.

(*m*) *Atwood* v. *Atwood* (1718), Prec. Ch. 492; *Re Cochrane* (1840), 8 Dowl. 630. As to the relation of husband and wife generally, see title HUSBAND AND WIFE.

(*n*) *Re Cochrane*, *supra*. See, however, *R.* v. *Jackson*, [1891] 1 Q. B. 671, C. A.; *Re Price* (1860), 2 F. & F. 263.

(*o*) *R.* v. *Brooke, Gregory's Case* (1766), 4 Burr. 1991.

(*p*) *R.* v. *Leggatt* (1852), 18 Q. B. 781.

(*q*) *Ex parte M'Clellan* (1831), 1 Dowl. 81; *R.* v. *Leggatt*, *supra*; *R.* v. *Jackson*, *supra*.

(*r*) *Lister's Case* (1721), 8 Mod. Rep. 22.

(*s*) *R.* v. *Jackson*, *supra*.

(*t*) *R.* v. *Turlington* (1761), 2 Burr. 1115; *Re Shuttleworth* (1846), 9 Q. B. 651; *Re Greenwood*, *R.* v. *Pinder* (1855), 24 L. J. (Q. B.) 148; *Re Elton* (1896), *Times*, May 1, 1896. See also *R.* v. *Wright* (1731), 2 Stra. 915; and as to lunatics generally, see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*a*) *R.* v. *Clarke* (1762), 3 Burr. 1362.

(*b*) *Ex parte Child* (1854), 15 C. B. 238; *Re Carter* (1893), 95 L. T. Jo. 37.

(*c*) *R.* v. *Wright* (1760), 2 Burr. 1100; *R.* v. *Turlington*, *supra*; *R.* v. *Riall* (1860), 11 I. C. L. R. 279.

SUB-SECT. 2.—*Procedure on Habeas Corpus.*

(i.) *Application for the Writ.*



Crown Office Rules.

**115.** The procedure for obtaining the writ of *habeas corpus* on the Crown side of the King's Bench Division is regulated by the Crown Office Rules, 1906 (*d*), and where no other provision is made by those rules the former procedure and practice remain in force (*e*).

The writ is granted upon motion or *ex parte* application or summons according to the nature and circumstances of the case (*f*).

Application to whom made.

**116.** An application may be made to the court or a judge (*g*). The court to which application may be made is a divisional court consisting of two or more judges of the King's Bench Division of the High Court of Justice (*h*). An application to a judge may be made at chambers whether in London or elsewhere (*i*). In London applications at chambers are made to the judge who sits daily during the law sittings in Judge's Chambers at the Royal Courts of Justice. But an application to a judge of the High Court for a writ of *habeas corpus* is without restriction as to place, a judge having power, which in cases of urgency is not infrequently exercised, to grant the writ at his own private residence, or any place where he may happen to be (*k*).

Application during term.

**117.** During the law sittings application for the writ of *habeas corpus*, whether at common law, as is the usual practice, or under the Habeas Corpus Act, 1679 (*l*), may be made either to a divisional court or to a judge at chambers (*m*). Applications for *habeas corpus* in cases relating to the custody of infants are in practice made to a judge at chambers, but in all other cases the application for a writ during the sittings should be made to the court and not at chambers. In extradition cases the application for a *habeas corpus* must be made to the court, for no application for a writ of *habeas corpus* on a warrant of extradition can be made to a judge at chambers during the sittings (*n*).

Application during vacation.

**118.** During vacation the application for the writ may be made to a judge at chambers (*o*). This applies to every class of case, including

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(*d*) Statutory Rules and Orders, 1906, p. 605.

(*e*) Crown Office Rules, r. 1. The former practice was regulated by the Crown Office Rules, 1886. As to the earlier practice, see Gude, Practice of the Crown Office.

(*f*) See pp. 57—60, *post*.

(*g*) Crown Office Rules, r. 216.

(*h*) As to the formation of a divisional court, see Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 4.

(*i*) See Crown Office Rules, r. 268.

(*k*) See Short and Mellor, Practice of the Crown Office, 2nd ed.

(*l*) 31 Car. 2, c. 2.

(*m*) Crown Office Rules, r. 216.

(*n*) *Ibid.*, r. 219.

(*o*) *Watson's* (*Leonard*) *Case* (1839), 9 Ad. & El. 731, also reported *sub nom. R.* v. *Batcheldor* (1839), 1 Per. & Dav. 516. In that case, where twelve writs of *habeas corpus* had been granted by LITTLEDALE, J., at chambers during vacation (on the 28th December, 1838), although the writs were return-

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extradition cases. The judges of the High Court are empowered and required by statute to award and issue the writ during vacation in criminal cases (*p*).

Application by counsel.

**119.** The application, whether on motion to the court or at chambers, should be made by counsel, as the court will not as a rule allow an applicant to move in person (*q*). In exceptional cases, however, applicants have been heard in person on the ground of poverty or extreme urgency (*r*).

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able immediate at chambers, yet owing to the importance of the case it was arranged that the prisoners should not be brought up before the ensuing Hilary Term (see Fry's Report of the Case of the Canadian Prisoners, at pp. 30, 31).

(*p*) Habeas Corpus Act, 1679 (31 Car. 2, c. 2), s. 2, for the terms of which see p. 44, *ante*. Since the Judicature Act, 1873 (36 & 37 Vict. c. 66), this statutory power and duty of granting the writ during vacation has become vested in the judges of the High Court of Justice, to any one of whom, consequently, an application for the writ might be made under the Act of 1679. It will be noticed that the mode of application prescribed by that statute is by "request" made in writing by the person imprisoned or anyone on his behalf attested and subscribed by two witnesses (s. 2). The "request" must be accompanied by a copy of the warrant of commitment or an affidavit that such copy has been denied (*ibid.*). Moreover, although not expressly required by the statute, an affidavit of the facts showing the ground upon which the application for a *habeas corpus* is based has always been regarded as essential (see Hand's Practice, p. 73). As already stated, under modern practice applications or the writ are invariably made under the common law jurisdiction and not under the statute, though there appears to be no reason why an application for the writ in criminal cases should not be made to a judge in vacation under the statutory jurisdiction.

(*q*) *Re Newton* (1855), 16 C. B. 97; *Ex parte Child* (1854), 15 C. B. 238. In *Re Newton, supra*, the court refused to allow a motion for a *habeas corpus* to be made by the father of a prisoner, but required the application to be made by counsel.

So in Easter, 1874, the court refused to allow one Cobbett, a layman, to move on behalf of Castro, a prisoner, in execution on a sentence upon an indictment for perjury (Short and Mellor, Practice of the Crown Office, 2nd ed., p. 321, n. (1)).

(*r*) Though in practice the writ of *habeas corpus*, like the prerogative writs (see, for instance, *Ex parte Wason* (1869), 10 B. & S. 580; *R.* v. *Eardley* (1885), 49 J. P. 551; *R.* v. *Liverpool Corporation* (1891), 7 T. L. R. 592, C. A.; *Ex parte Whyte* (1896), 12 T. L. R. 458, C. A.), is moved for by counsel on behalf of the applicant, the court has, in favour of liberty, in some few cases allowed applications for the writ to be made in person. See *Re Newton, supra*, where, though the court refused to hear a motion by a father for a writ on behalf of his son, it was stated by JERVIS, C.J., that the judges did not lay down any inflexible rule, but merely held that in the particular circumstance it would be better for the motion to be made by counsel; *Cobbett* v. *Hudson* (1850), 15 Q. B. 988, where a wife was allowed to move in person for a *habeas corpus* on behalf of her husband, and Lord CAMPBELL, C.J., pointed out "that great inconvenience might arise in cases where the liberty of the subject is in question from refusing to hear the wife or any person on behalf of the party under restraint"; *Ex parte Sigismund*, unreported, *coram* DARLING and CHANNELL, JJ., March 12th, 1901, where a father was allowed to apply in person to a divisional court for a writ of *habeas corpus* to obtain the custody of his child from persons to whom it had been intrusted by his wife, the court intimating that, although from the nature of the case, involving as it did complicated questions of law, it would have been better for the application to have been made by counsel, they were willing to hear the applicant in person, he having stated that he was not in a position to instruct counsel (the applicant had previously appeared and been heard in person before BUCKNILL, J., at chambers).

Who is entitled to apply for writ.

**120.** The person illegally imprisoned or detained in confinement without legal justification is, both at common law and by statute (*s*), entitled to apply for a writ of *habeas corpus*, but it is not essential that the application should proceed directly from him.

Any person is entitled to institute proceedings to obtain a writ of *habeas corpus* for the purpose of liberating another from an illegal imprisonment (*t*), and any person who is legally entitled to the custody of another may sue out the writ in order to regain such custody (*a*). In any case where access is denied to a person alleged to be unjustifiably detained, so that there are no instructions from the prisoner, the application may be made by any relation or friend on an affidavit setting forth the reasons for its being made (*b*).

A mere stranger or volunteer, however, who has no authority to appear on behalf of a prisoner or right to represent him will not be allowed to apply for *habeas corpus* (*c*).

Mode of application to court.

**121.** An application to the court (*d*) for a writ must be made by motion for an order (*e*). The motion is made by counsel in open court in the usual manner and must be supported by affidavit (*f*). As the liberty of the subject is affected, it is entitled to precedence over all other motions on the same day (*g*).

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(*s*) See p. 43, *ante*.

(*t*) Habeas Corpus Act, 1679 (31 Car. 2, c. 2), ss. 2, 9.

(*a*) *Re Daley* (*Elizabeth*) (1860), 2 F. & F. 258; see also *Re Thompson* (1860), 30 L. J. (M. C.) 19. The writ has been granted on the application of a husband on behalf of his wife (*R.* v. *Clarke* (1758), 1 Burr. 606; see also *R.* v. *Brooke, Gregory's Case* (1766), 4 Burr. 1991); of a wife on behalf of her husband (*Cobbett* v. *Hudson* (1850), 15 Q. B. 988); of a father on behalf of a son (*Re Thompson, supra*); of a sister on behalf of her sister (*Re Daley* (*Elizabeth*), *supra*). An application for the writ may be made by an agent or friend on behalf of a prisoner (see *Ashby* v. *White* (1704), 14 State Tr. 695, 4th Resolution, at p. 825).

In cases where the custody of children is in dispute the proper party to make the application for the writ is the parent or guardian who claims to be entitled to the custody, and it must be shown that the applicant *primâ facie* possesses a legal right to the custody (see *Re Harper*, [1895] 2 I. R. 571).

(*b*) See *Hottentot Venus's Case* (1810), 13 East, 195; also cases cited note (*a*), *supra*.

(*c*) *R.* v. *Clarke* (1762), 3 Burr. 1362. The secretary of a Lunatic Friend Society, who was a mere stranger and acting without authority, was held not to be entitled to make an application for a *habeas corpus* on behalf of a person who was alleged to be wrongfully detained as a lunatic (*Ex parte Child* (1854), 15 C. B. 238; see also *Re Carter* (1893), 95 L. T. Jo. 37). A mere stranger, it has been said, has no right to come to the court and ask that a party who makes no affidavit, and who is not suggested to be so coerced as to be incapable of making one, may be brought up by *habeas corpus* to be discharged from restraint (*Ex parte Child, supra, per* JERVIS, C.J., at p. 239).

(*d*) That is, a divisional court of the King's Bench Division.

(*e*) Crown Office Rules, r. 217.

(*f*) The practice as to motions which is regulated by R. S. C., Ord. 52, 1883, is, as far as it is applicable, applied to all proceedings on theCrown side (Crown Office Rules, r. 232). All orders of court (except certain orders of course specified in *ibid.*, r. 233) during the sittings are to be made by the court on motion supported by affidavit (*ibid.*, r. 234). Applications on the Crown side made by way of motion to a divisional court are to be for an order *nisi* (*ibid.*, r. 235).

(*g*) The rule giving precedence to motions affecting the liberty of the subject has been long established; it applies where a person in custody is brought up on

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There must be at least two clear days between the service of the notice of motion and the day named in the notice for the hearing (*h*).

The hearing of the motion may be adjourned from time to time upon such terms as the court thinks fit (*i*); and if the court is of opinion that any person to whom notice has not been given ought to have or to have had such notice the court may either dismiss the motion or adjourn the hearing, in order that notice may be given upon such terms as the court may think fit to impose (*k*).

Practice in extradition cases.

**122.** In extradition cases the practice is to apply for a rule *nisi* calling on the Home Secretary, the chief metropolitan magistrate, and the foreign Government to show cause why the writ should not issue (*l*). The application for the writ during the law sittings must be by motion to a divisional court, and not to a judge at chambers (*m*). During vacation an application for the writ in cases of extradition may be made to a judge out of court. In all cases the application must be supported by affidavit showing ground for the interference of the court, and accompanied by a copy of the commitment verified by affidavit (*n*).

Application to judge at chambers.

**123.** The writ is grantable in certain cases by a judge at chambers during the law sittings as well as in vacation (*o*). In such cases the application may be made *ex parte*, and the judge may order the writ to issue *ex parte* in the first instance, or he may direct a summons, which must be drawn up in the prescribed form (*p*), for the writ to issue (*q*). But no such summons can be issued without leave (*r*).

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*habeas corpus*, but does not extend to showing cause against a rule for a *habeas corpus* (*Re Thompson* (1860), 6 Jur. (N. S.) 1121).

(*h*) R. S. C., Ord. 52, r. 5. In the event of no one appearing to support the notice of motion the party appearing to show cause would be entitled to costs (*Berry* v. *Exchange Trading Co.* (1875), 1 Q. B. D. 77).

(*i*) R. S. C., Ord. 52, r. 7.

(*k*) *Ibid.*, r. 6.

(*l*) See *R.* v. *Ganz* (1882), 9 Q. B. D. 93, n. As to extradition, see p. 50, *ante*; and generally title EXTRADITION AND FUGITIVE OFFENDERS.

(*m*) Crown Office Rules, r. 219.

(*n*) Habeas Corpus Act, 1679 (31 Car. 2, c. 2), s. 4, which requires the gaoler or other officer under heavy penalty to deliver a copy of the commitment within six hours after demand has been made by the prisoner or any person on his behalf.

(*o*) The judges possessed this jurisdiction at common law, and the practice is recognised by the Crown Office Rules, though the provisions of the Habeas Corpus Act, 1679 (31 Car. 2, c. 2), in terms merely empower the judges, as distinguished from the court, to issue the writ during the vacation (see Short and Mellor, Practice of the Crown Office, 2nd ed., pp. 320—322; see also Crown Office Rules, r. 216).

(*p*) For form of summons for writ of *habeas corpus ad subjiciendum*, see Crown Office Rules, 1906, Appendix, Form No. 174. The summons states that upon hearing counsel or the solicitor for the applicant, and upon reading the several affidavits, it is ordered that all parties concerned attend the judge at chambers on the day and at the hour specified to show cause why a writ of *habeas corpus* should not issue directed to the respondent to have the body of the person alleged to be illegally detained before a judge at chambers immediately after the receipt of such writ to undergo etc.

(*q*) Crown Office Rules, r. 218.

(*r*) *Ibid.*, r. 266. The summons must be issued from, and the order drawn up

Practice in cases of custody of infants.

**124.** In all cases in which the right to the custody of children is in question the invariable rule is that the application for the writ should be made to a judge at chambers, and this whether the application be made during "the law sittings or in vacation" (*a*). But the judge, in any case where he deems such a course to be expedient, may adjourn the hearing of the application into court (*b*).

Affidavits in support of application.

**125.** Every application for a writ, whether at common law or under the Habeas Corpus Act, 1679 (*c*), must be supported by affidavit (*d*), upon which the court is able to exercise its discretion as to whether the writ shall be issued or not (*e*). It should be made by the prisoner or party who claims the writ or by some other person on his behalf and with his authority, or by some person who can satisfy the court that the person on whose behalf the application is made is so coerced as to be unable to make an affidavit (*f*), and should set out all the material facts and show circumstances disclosing a *primâ facie* case for the issue of the writ.

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at, the Crown Office Department of the Central Office of the Supreme Court (*ibid.*, r. 265).

(*a*) In an unreported case, *coram* BLACKBURN, MELLOR, and LUSH, JJ., the Court of Queen's Bench on 11th June, 1872, refused to hear a case relating to the custody of children in court, and stated that all such applications should in the first instance be made at chambers (see Short and Mellor, Practice of the Crown Office, 2nd ed., p. 320). Since that time this has been the recognised practice.

(*b*) This course is adopted when the argument is likely to be lengthy or when novel or difficult points of law are involved. In *Re Dolben* (1896), not reported, the hearing of an application by summons for a *habeas corpus* by a mother to obtain the custody of her children during their holidays from their father under the provisions of a deed of separation was referred by DAY, J., from himself, sitting at chambers, to himself in court.

(*c*) 31 Car. 2, c. 2.

(*d*) The ordinary practice of the High Court in relation to affidavits is applicable to affidavits in support of applications for writs of *habeas corpus* (Crown Office Rules, r. 25, applying R. S. C., Ord. 38, to all proceedings on the Crown side of the King's Bench Division). Affidavits used on the Crown side must be intituled "In the High Court of Justice, King's Bench Division" (Crown Office Rules, r. 6). Affidavits may be sworn before any first or second class clerk in the Crown Office or before any officer empowered under the Rules of the Supreme Court for that purpose (see *ibid.*, r. 7).

(*e*) The writ of *habeas corpus* was formerly granted upon a mere verbal application without an affidavit (see *R.* v. *Heath* (1744), 18 State Tr. 1, *per* MARLAY, C.J., at p. 19). For at least a century, however, it has been a well-recognised rule that every application for the writ must be supported by affidavit (see *Hobhouse's Case* (1820), 3 B. & Ald. 420).

Whether the writ be granted under the common law jurisdiction or under the statute, there ought always to be a proper ground laid before the court to justify it in granting a writ. It is not to be granted as a matter of course, at all events, but the party seeking to be brought up by *habeas corpus* must lay such a case on affidavit before the court as will be sufficient to regulate the discretion of the court in that respect (see *Hobhouse's Case*, as reported 2 Chit. 207, at p. 211; see also *R.* v. *Schiever* (1759), 2 Burr. 765; *Three Spanish Sailors' Case* (1779), 2 Wm. Bl. 1324; *Re Carter* (1893), 95 L. T. Jo. 37).

(*f*) In the *Canadian Prisoners' Case, Re Parker* (1839), 5 M. & W. 32, a motion for a writ of *habeas corpus* was made on an affidavit of a solicitor on behalf of the prisoners, and also on an affidavit by the solicitor's clerk. The court having intimated that there ought to be an affidavit from the prisoners themselves, counsel referred to the *Hottentot Venus's Case* (1810), 13 East, 196, but the court pointed out that in that case a reason was assigned for not producing an affidavit

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The affidavits must be filed in the Crown Office Department of the Central Office (*g*). On every affidavit there must be indorsed a note showing on whose behalf it is filed, and no affidavit can be filed or used without such note unless the court or judge otherwise directs (*g*).

Upon motions founded upon affidavits either party may apply to the court or judge for leave to make additional affidavits upon any new matter arising out of the affidavits of the opposite party, but no additional affidavits can be used unless such leave has been first obtained (*h*).

The applicant upon obtaining an order *nisi* or summons at chambers must, on demand by the respondent or his solicitor, supply copies of any affidavit on which such order *nisi* or summons was obtained, and any respondent who proposes to read any affidavits upon showing cause, must on demand supply copies of such affidavits to the applicant or his solicitor on payment of the ordinary charges (*i*).

(ii.) *The Order for the Writ.*

Order *nisi* and order absolute.

**126.** Upon an application for a writ of *habeas corpus* being made to a divisional court or judge at chambers, the court or judge, after reading the affidavits and hearing counsel, proceeds to make an order for the issue of the writ or dismissal of the application. Where the application is made to the court the court has power to make an order absolute *ex parte* for the writ to issue in the first instance, or to grant an order *nisi* (*k*). Similarly, where the application is made to a judge at chambers the judge has power to order the writ to issue *ex parte* in the first instance, or he may direct a summons for the writ to issue (*l*).

Urgent cases.

**127.** Though the writ of *habeas corpus* is a writ of right upon ground being shown for its issue, it is usual in practice instead of granting an order absolute to grant an order *nisi* only in the first instance (*m*). But in an urgent case, or when time is of importance, or in any case where the granting of an order *nisi* would be likely to result in a

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from the party herself, and stated that before granting a *habeas corpus* to remove a person in custody the court must ascertain that an affidavit is not reasonably to be expected from him, and that an affidavit is absolutely necessary either from the party who claims the writ or from some other person so as to satisfy the court that he is so coerced as to be unable to make it.

So in *Ex parte Child* (1854), 15 C. B. 238, a rule having been obtained for a writ of *habeas corpus* to bring up a person confined in an asylum as a lunatic, the court discharged the rule with costs, there being no affidavit to show that the party promoting the application was duly authorised by the lunatic.

(*g*) Crown Office Rules, r. 8.
(*h*) *Ibid.*, r. 9.
(*i*) *Ibid.*, r. 10.
(*k*) *Ibid.*, r. 217.
(*l*) *Ibid.*, r. 218.
(*m*) An order *nisi*, as a general rule, is made on account of its greater convenience and with a view to saving expense, for if upon hearing the answer of the respondent the court dismisses the application, both the inconvenience and the expense of bringing up a person, possibly from a distance, are avoided (see *Eggington's Case* (1853), 2 E. & B. 717, 734).

In extradition cases an order *nisi* is invariably applied for.

defeat of justice, an order absolute for the writ to issue will be made in the first instance (*n*).

Order for writ must be unconditional.

**128.** The order for the writ to issue, when made, cannot be fettered by any conditions or terms. Thus, if the writ be granted on the ground of illegal imprisonment a condition or term restraining the applicant from pursuing his remedy by action for false imprisonment cannot be imposed as part of the rule for the issue of the writ (*o*), nor can the writ be ordered to lie in the office until the respondent comes within the jurisdiction (*p*), or until some future date.

Drawing up order.

After an order for the writ to issue has been granted, whether by the court or by the judge at chambers, the order must be drawn up at the Crown Office (*q*) in the prescribed form (*r*).

An order in cases where process has issued from the King's Bench Division is an order of course, which may be drawn up at the Crown Office without any motion for the same (*s*); but except orders of course no order on the Crown side may be drawn up without the leave or order of the court or a judge or of the King's Coroner and Attorney or the Master of the Crown Office (*t*).

Order for discharge before return

**129.** On the argument of the order *nisi* or summons at chambers for a writ, the court or judge may, in its or his discretion, without waiting for the return to the writ, direct an order to be drawn up for the prisoner's discharge, and such an order is a sufficient warrant to any gaoler, constable, or other person for the discharge of the prisoner or any infant or person under restraint (*a*).

(*n*) Thus, in cases relating to the custody of infants, where there is a probability of the child being removed out of the jurisdiction, or taken abroad, or kept in concealment, or its custody being changed or parted with, the granting of an order absolute is an expedient and proper course, and is usually adopted (*Ex parte Witte* (1853), 13 C. B. 680; see *Cox* v. *Hakes* (1890), 15 App. Cas. 506).

(*o*) *Ex parte Hill* (1827), 3 C. & P. 225.

(*p*) *R.* v. *Pinckney*, [1904] 2 K. B. 84, C. A.

(*q*) It is usual to draw up the order in every case, criminal or civil, though in civil proceedings it is not always necessary to do so (see Short and Mellor, Practice of the Crown Office, 2nd ed., at p. 323). In civil proceedings where an order has been made not embodying any special terms, nor including any special directions, but simply giving leave for the issue of any writ (other than a writ of attachment), or for the amendment of any writ, it is not necessary to draw up such order unless the court or judge shall otherwise direct, but the production of a note or memorandum of such order signed by a judge, registrar, or master, is sufficient authority for the issue or amendment of the writ (see R. S. C., Ord. 52, r. 14, which so far as is applicable is applied to all civil proceedings on the Crown side by the Crown Office Rules, r. 232).

(*r*) *I bid.*, r. 269. In substance the order is as follows:—Upon reading the several affidavits of etc., filed etc., and upon hearing counsel upon both sides, It is ordered that a writ of *habeas corpus* issue directed to etc., to have the body of A. B. before a judge in chambers (or the court) at the Royal Courts of Justice, London, immediately after the receipt of such writ to undergo and receive etc. (*ibid.*, Appendix, Form No. 175).

(*s*) Crown Office Rules, r. 233 (g).

(*t*) *I bid.*, r. 239.

(*a*) *I bid.*, r. 225. This power has been exercised in cases where on the argument of a rule for a *habeas corpus* to bring up a person in prison under a summary conviction the court has been satisfied that the prisoner was not subject to the jurisdiction of the justices (see *Re Authers* (1889), 22 Q. B. D. 345; *Re Bailey* (1854), 3 E. & B. 607; *Re Baker* (1857), 2 H. & N. 219).

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Renewal of application in other courts.

**130.** The applicant has a right to the opinion of every court as to the expediency of his imprisonment. If an application for the writ be refused, the applicant is entitled to renew his application before another court, and, if he think fit, to proceed from court to court, making an application to each court in turn (*b*).

Costs of application.

**131.** The court, when granting the application, can order the defendant to pay the costs of the successful party (*c*). There is, however, no power to make such an order for the payment of costs against any person who is not on the record (*d*).

(iii.) *The Writ.*

Drawing up writ.

**132.** The practice with regard to the drawing up, issue, and service of the writ of *habeas corpus* is regulated by the Crown Office Rules, 1906 (*e*).

Form of writ.

**133.** The writ of *habeas corpus* consists of a formal greeting from the Crown to the person to whom it is directed, followed by a mandatory order by the court or judge directed to any person whomsoever, whether a gaoler or other officer, or a private individual who is alleged to have another person unlawfully in his custody, requiring him to have the body of such person before the court or judge immediately after the receipt of the writ, together with the day and cause of his being taken and detained, to undergo and receive all such things as the court may order (*f*).

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(*b*) *Ex parte Partington* (1845), 13 M. & W. 679, *per* PARKE, B., at p. 684. In this case a writ of *habeas corpus* had been granted by the Court of Queen's Bench, and on the return the discharge of the prisoner was refused. The prisoner made a subsequent application for the writ to the Lord Chief Baron of the Exchequer in chambers, with similar result. On a third application for a writ of *habeas corpus* being made to the Court of Exchequer, the court, after careful consideration of the case, refused the application for the issue of the writ, and stated that they did not consider the matter as concluded by the two previous applications. As to the right to renew the application for the writ, see also *Cox* v. *Hakes* (1890), 15 App. Cas. 506, *per* Lord HALSBURY, L.C., at p. 514; and *per* Lord BRAMWELL, at p. 523.

(*c*) *R.* v. *Jones*, [1894] 2 Q. B. 382. The courts have always exercised the power of awarding to the officer who brings up a prisoner in compliance with a writ of *habeas corpus* his reasonable expenses so incurred (*Re Cobbett* (1845), 14 M. & W. 175; *Re Dodd* (1858), 2 De G. & J. 510). In criminal cases the courts formerly had no power to award costs on *habeas corpus*. In civil cases—as, for instance, in cases relating to the custody of infants on the other hand—the costs of a successful applicant for a writ of *habeas corpus* were sometimes awarded; see *Ex parte Child* (1854), 15 C. B. 238. Now, however, since the Judicature Act, 1890 (53 & 54 Vict. c. 44), the court has power under s. 5 of that Act to award costs to the successful party on an application for a writ of *habeas corpus* (*R.* v. *Jones*, *supra*; see also *R.* v. *Woodhouse*, [1906] 2 K. B. 501, C. A. (*certiorari*)).

(*d*) *Re Carter* (1893), 95 L. T. Jo. 37, where a second application for a writ of *habeas corpus* was made in the name of a person detained as a criminal lunatic, who, it appeared, had authorised the solicitor to make a former application, but had given no authority for the second application, and it was held that the court had no jurisdiction to make an order for costs against the person who had directed the application to be made, such person not being on the record. It was said that a writ of *habeas corpus* shall not be allowed to issue without an affidavit either from the person in whose name the application was made or from the person really responsible for costs, so that the other party might know on whom to rely for payment of the costs (*ibid.*, *per* VAUGHAN WILLIAMS, J.).

(*e*) Crown Office Rules, rr. 216—227.

(*f*) "The writ is a demand by the King's Supreme Court of Justice to produce

Direction of writ.

The writ, which must be prepared by the solicitor or the party suing it out, and must be written or printed on parchment or paper as prescribed by the rules (*g*), should be drawn up in the prescribed form (*h*). It must be directed to the person or persons in whose custody the party detained is or is alleged to be, as for instance to the gaoler in the case of a person in custody in prison (*i*), and must be made returnable immediately (*j*). It may be directed to any number of individuals taking part in the illegal detention (*k*); but if directed to two or more persons in the alternative it is bad and will be quashed (*i*). It must bear date on the day on which it is issued (*l*); and should be tested at the Royal Courts of Justice, London, in the name of the Lord Chief Justice of England (*m*).

Before being sealed the writ must be indorsed with the name

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a person under confinement, and to signify the reason of his confinement" (Wilm. 106; see also 3 Bl. Com. 129; 8 State Tr. 142).

(*g*) Crown Office Rules, r. 210. In practice the writ is usually settled by counsel and should be prepared according to the form given in the Appendix to the Crown Office Rules, 1906, with the necessary insertions and variations (*ibid.*, Appendix, Form No. 176).

(*h*) Crown Office Rules; r. 269 provides that the forms in the Appendix when applicable, and where not applicable forms of the like character as near as may be, shall be used in all proceedings on the Crown side. For the form prescribed see *ibid.*, Form No. 176, which is as follows:

*Writ of Habeas Corpus ad Subjiciendum.*

Edward the Seventh by the Grace of God, etc., to greeting: We command you that you have in the King's Bench Division of Our High Court of Justice [*or* before a Judge in Chambers] at the Royal Courts of Justice, London, immediately after the receipt of this Our Writ, the body of A. B., being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein to undergo and receive all and singular such matters and things as Our said Court [*or* Judge] shall then and there consider of concerning him in this behalf; and have you there then this Our Writ.

Witness, &c.

TO BE INDORSED.

By order of the Court [*or* of Mr. Justice ].

This writ was issued by, etc.

For precedents of earlier forms of the writ, see 2 Co. Inst. 53; *R.* v. *Gardner* (1728), Tremaine, Pleas of the Crown, 354; *Wilson's* (*Carus*) *Case* (1845), 7 Q. B. 984.

(*i*) *R.* v. *Fowler* (1700), 1 Salk. 350; *R.* v. *Batcheldor* (1839), 1 Per. & Dav. 516, where twelve writs of *habeas corpus* were granted directed to "William Batcheldor, keeper of the gaol of the borough of Liverpool."

(*j*) Crown Office Rules, r. 213.

(*k*) *Re Douglas* (1842), 12 L. J. (Q. B.) 49, where a writ of *habeas corpus* was directed "to the governor of Tothill-fields, Bridewell, to Lieut.-Col. Edward Hay and to each and every the officer or officers person or persons having the custody charge or control of Captain Archibald Douglas"; *Wilson's* (*Carus*) *Case*, *supra*, where the writ was directed "to John Kandich, gaoler of Her Majesty's gaol in Jersey and to John Le Couteur, Viscount of the said island."

(*l*) Crown Office Rules, r. 212. As to obtaining leave to amend the date on which the writ was tested, see *Ex parte Davies* (1837), 4 Bing. (N. C.) 17; and as to waiving the irregularity of testing the writ on a day other than that on which it was issued, see *Newton* v. *Rowe* (1843), 13 L. J. (C. P.) 73.

(*m*) Crown Office Rules, r. 212. The teste of a writ of *habeas corpus* has been held to be good without the title of the Chief Justice, but merely with his name (*Vasper* v. *East* (1685), 2 Show. 344).

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and address of the solicitor or party suing out the same, and, if sued out by the solicitor as agent, with the name and address of the principal also (*n*). It should also be indorsed "By order of the court," or "By order of Mr. Justice ", as the case may be (*o*). If it is issued under the Habeas Corpus Act, 1679 (*p*), it must be indorsed *Per statutum tricesimo primo Caroli secundi regis*, and must be signed by the person who awards the same (*q*).

Issue of writ.

**134.** Writs of *habeas corpus* are issued at the Crown Office Department of the Central Office (*r*) upon production by the solicitor or party suing it out of the order for the writ to issue and upon a præcipe impressed with a 5*s.* stamp being left (*s*). If the writ is returnable in court it must, together with the return thereto, be filed in the Crown Office, and if returnable before a judge, it must, after the decision of the judge thereon, be so filed with the return and any order made thereon, or a copy of such order (*t*).

Every writ of *habeas corpus* issued at the Crown Office must be entered in a book kept for the purpose (*a*).

Service of writ.

**135.** The writ of *habeas corpus* must be served personally, if possible, upon the party to whom it is directed (*b*). If it be impossible to effect personal service of the writ, or if the writ be directed to a gaoler or other public official, service must be effected by leaving it with a servant or agent of the person confining or restraining at the place where the prisoner is confined or restrained (*c*).

If the writ be directed to more than one person the original must be delivered to or left with the principal person and copies

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(*n*) Crown Office Rules, r. 210.

(*o*) See *ibid.*, Appendix, Form No. 176; and see p. 55, *ante*. Formerly it was essential to the validity of a writ of *habeas corpus* that the signature of the judge who granted it should be indorsed, and in the absence of such signature the writ need not have been obeyed (*R.* v. *Roddam* (1777), 2 Cowp. 672).

(*p*) 31 Car. 2, c. 2.

(*q*) This is an express requirement of *ibid.*, s. 2 (*R.* v. *Roddam*, *supra*) In modern practice writs of *habeas corpus* are almost invariably issued at common law and not under the Habeas Corpus Act, but if a writ were issued under the Act it should be indorsed as required by the state. Every writ of *habeas corpus* which is not so indorsed is a writ of *habeas corpus* at common law (*Brass Crosby's Case* (1771), 3 Wils. 188, *per* DE GREY, C.J., at p. 198; *Hobhouse's Case* (1820), 3 B. & Ald. 420, *per* HOLROYD, J., at p. 423).

(*r*) Crown Office Rules, r. 209. This rule is in conformity with the earlier practice, under which it was settled that in all criminal matters and causes on the Crown side of the King's Bench the writ of *habeas corpus* must be issued from the Crown Office (*Taylor's Case* (1803), 3 East, 232; *Fowler* v. *Dunn* (1767), 4 Burr. 2034, n.; *Easton's Case* (1840), 12 Ad. & El. 645, where Lord DENMAN C.J., pointed out that the regular course was for the writ to issue on the Crown side, because parties may desire to search the proper office to learn whether the writ has issued). In non-criminal cases, such as cases relating to the custody of infants, it would seem that the writ of *habeas corpus* might be issued on the civil side of the King's Bench Division, but in practice the writ is always issued at the Crown Office.

(*s*) See Short and Mellor, Practice of the Crown Office, 2nd ed., p. 323.

(*t*) See Crown Office Rules, r. 214.

(*a*) *Ibid.*, r. 211.

(*b*) *Ibid.*, r. 220.

(*c*) *Ibid.*; and see Habeas Corpus Act, 1816 (56 Geo. 3, c. 100), ss. 2, 6.

served or left on each of the other persons in the same manner as the writ (*d*). If the original writ is not delivered to the principal of several persons to be served, the service of a copy of the writ upon the others is not a good service upon any of the others (*e*).

When it is possible to effect personal service a writ of *habeas corpus* can only be properly served by actually delivering the original writ to the person to be served, and if a copy of the writ is served this is an irregularity which the person served cannot waive by appearing so as to render himself liable to attachment for disobedience to the writ (*f*).

The writ must be served immediately after it is issued, and the court has no power to order it to issue and to lie in the office until the person to whom it is directed shall come within the jurisdiction (*g*).

Notice of issue of writ.

**136.** A notice of the issue of the writ and of the consequences of failing to make a due return to it must be prepared by the applicant or his solicitor, and served with the writ upon the persons to whom it is directed, and any other person upon whom it may be deemed necessary to serve the writ.

The notice should be signed by the solicitor for the applicant, or by the applicant himself if he is acting in person (*h*).

When a writ of *habeas corpus* has been obtained on an informal or illegal commitment a notice should be served upon the committing magistrates and the prosecutor reciting that the writ has been granted and requiring them to take notice that by virtue of the said writ the person alleged to be illegally detained will be brought before the court or a judge at chambers at the Royal Courts of Justice, London, on the day and at the hour specified, in order that he may be discharged out of custody as to the commitment by which he is detained in custody (*i*).

Motion to quash writ.

**137.** Where objection is taken to a writ of *habeas corpus* on the ground that it was irregularly or improperly issued, or that it was obtained by means of fraud, as by fraudulently misrepresenting the facts of the case on the affidavits in support of the application for it, the writ may be quashed (*k*) upon application made to a

(*d*) Crown Office Rules, r. 220.

(*e*) *R.* v. *Rowe* (1894), 71 L. T. 578.

(*f*) *Ibid.*, where an attachment for disobedience to a writ of *habeas corpus* was refused on this ground. In the event of the original writ being inadvertently lost before service, it would seem that a new writ would be allowed to issue; see *Pease* v. *Shrimpton* (1651), Sty. 261.

(*g*) *R.* v. *Pinckney*, [1904] 2 K. B. 84, C. A.

(*h*) For form of notice, see Crown Office Rules, Appendix, Form No. 177. The object of the notice is to indicate precisely the time when and place at which the return to the writ must be made, and this is the more necessary as the writ itself in form is made returnable immediately after its receipt (see the form of writ, at p. 63, *ante*).

(*i*) Crown Office Rules, Appendix, Form No. 178. For form of affidavit of service of the writ of *habeas corpus* and of the accompanying notice, see *ibid.*, Form No. 179.

(*k*) In *Wilson's* (*Carus*) *Case* (1845), 7 Q. B. 984, on the suggestion that the judge who had granted the rule for the issue of a writ of *habeas corpus* had been misled by the affidavits, it was argued by Sir Frederick Thesiger, the Solicitor-General, that if the writ be issued without authority it is void, and ought to be

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divisional court on motion for an order *nisi* (*l*); and the objection should not be raised on motion to discharge the prisoner upon the return to the writ (*m*).

A writ of *habeas corpus* will not be quashed merely on the ground that the judge who ordered it to issue abstained from inquiring into facts, which, if known to him, might probably have induced him either to refuse the writ or only to grant a rule *nisi*, especially if such facts might properly be stated on the return (*n*), nor for matter that can properly be returned to it (*o*).

(iv.) *The Return.*

Time and place for return.

**138.** Every writ of *habeas corpus ad subjiciendum* must be made returnable immediately (*p*) either in the King's Bench Division or before a judge at chambers, according as it has been issued by the court or a judge, unless otherwise ordered (*q*). But though in form it is made returnable immediately, in practice the actual time and place for the return is set out in the notice which is served with the writ (*r*), and the court would not receive the return before the proper day for making the return has arrived (*a*).

A reasonable time, according to the circumstances of the particular case, is allowed for making the return to a writ issued at common law (*b*),

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set aside without setting aside the judge's order (*ibid.*, at p. 996). In reply to a question by the court as to whether there was any instance of quashing a writ of *habeas corpus* in the way suggested, it was stated (*ibid.*, at p. 998) that a *certiorari* might be quashed, and in *R.* v. *Cowle* (1759), 2 Burr. 834, at p. 855, Lord MANSFIELD had treated the question whether a *certiorari* could go to Berwick as analogous to the question whether a *habeas corpus* could go thither. In his judgment Lord DENMAN, C.J., stated (7 Q. B. at p. 1000) that if it appeared beyond a doubt that a fraud had been practised the writ ought to be quashed.

(*l*) See Crown Office Rules, r. 235.

(*m*) See Short and Mellor, Practice of the Crown Office, 2nd ed., p. 324.

(*n*) *Wilson's* (*Carus*) *Case* (1845), 7 Q. B. 984.

(*o*) *Ibid.*, at p. 1001.

(*p*) Crown Office Rules, r. 213. In its present form the writ requires the return to be made "immediately after the receipt of this our writ" (*ibid.*, Form No. 176; see p. 63, *ante*).

(*q*) Crown Office Rules, r. 213.

(*r*) See *R.* v. *Pinckney*, [1904] 2 K. B. 84, C. A.; and p. 65, *ante*.

(*a*) *Mash's Case* (1772), 2 Wm. Bl. 805.

(*b*) *Stockdale* v. *Hansard* (1840), 8 Dowl. 474. The preamble of the Habeas Corpus Act, 1679 (31 Car. 2, c. 2), recited that great delays had been used in making returns to writs of *habeas corpus* in criminal or supposed criminal cases. To remedy this s. 1 of the statute enacted that in such cases the return should be made within three days after the service of the writ if the place where the prisoner is detained is within twenty miles from the court, and if beyond the distance of twenty miles and not above one hundred miles, then within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days after the delivery of the writ, and not longer. These statutory periods for making the return are, however, inapplicable in modern practice, as the writ is issued at common law, and not under the statute.

The Habeas Corpus Act, 1816 (56 Geo. 3, c. 100), s. 2, enacted that a writ of *habeas corpus* issued in vacation might be made returnable in court in the next term, and a writ issued in term might be made returnable in vacation before a judge where the writ was awarded too late in the term or vacation to be conveniently obeyed within the term or vacation respectively; and these provisions were made applicable to writs issued under the Habeas Corpus Act, 1679 (31

and the time may be extended by the court where good cause is shown (*c*).

Duty to make return.

**139.** In compliance with the mandatory directions contained in the writ, the person to whom it is directed is under a legal obligation to produce the body of the person alleged to be unlawfully detained before the court on the day specified, and to make a formal return to the writ (*d*). The end of the writ is to return the cause of the imprisonment, so that it may be examined in court whether the party ought to be discharged or not (*e*). This is equally true in non-criminal cases, for the writ in every case requires the production of the person detained, together with a statement of the grounds of his detention (*f*).

Contents of return.

**140.** The return, which must always be accompanied by the writ (*g*), must contain a copy of all the causes of the prisoner's detainer indorsed on the writ or on a separate schedule annexed thereto (*h*). It should state facts constituting a valid and sufficient ground for detention of the person alleged to be illegally detained (*i*). These facts must be set forth clearly and directly and with sufficient particularity (*k*). The return must be unambiguous (*l*).

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Car. 2, c. 2) (Habeas Corpus Act, 1816 (56 Geo. 3, c. 100), s. 6). See also *R.* v. *Shebbeare* (1758), 1 Burr. 460; *R.* v. *Mead* (1758), 1 Burr. 542; *R.* v. *Clarke* (1758), 1 Burr. 606.

(*c*) *Barnardo* v. *Ford, Gossage's Case*, [1892] A. C. 326, 341, where the time for making the return to the writ of *habeas corpus* was on appeal to the House of Lords extended to three months from the date of the judgment which affirmed the order appealed against; *R.* v. *Clarke* (1762), 3 Burr. 1362, where, on it appearing that the person confined was a lunatic and was detained by relations who were proceeding *bonâ fide* to obtain a commission of lunacy, the period for the return to a writ of *habeas corpus* was extended.

(*d*) *Anon.* (1729), 1 Barn. (K. B.) 151 *Darnel's Case* (1627), 3 State Tr. 1, 6; *Lilburn's Case* (1648), Sty. 96; *R.* v. *Greenway* (1681), 2 Show. 172.

(*e*) *Darnel's Case, supra.*

(*f*) See the form of writ of *habeas corpus ad subjiciendum*, Crown Office Rules, Form No. 176; and p. 63, *ante*.

(*g*) See the form of writ, p. 63, *ante*; Crown Office Rules, r. 222; see also *Ex parte Besset* (1844), 6 Q. B. 481. The usual form of return commences "I A. B., in obedience to the writ herewith do certify and return that," etc. For precedents of returns to writs of *habeas corpus* see *Bushell's Case* (1670), Vaugh. 135; *R.* v. *Batcheldor* (1839), 1 Per. & Dav. 516; *Watson's (Leonard) Case* (1839), 9 Ad. & El. 731, 733—736; *Re Douglas* (1842), 12 L. J. (Q. B.) 49; *Wilson's (Carus) Case* (1845), 7 Q. B. 984, 1002—1006; *Shuttleworth's Case* (1846), 9 Q. B. 641.

(*h*) Crown Office Rules, r. 223.

(*i*) See *Deybel's Case* (1821), 4 B. & Ald. 243; *Souden's Case* (1821), 4 B. & Ald. 294; *Nash's Case* (1821), 4 B. & Ald. 295; *Canadian Prisoners' Case, Re Parker* (1839), 5 M. & W. 32.

(*k*) See the cases cited in note (*g*), *supra*; as to the sufficiency of a return to a writ of *habeas corpus*, see further *Howel's Case* (1587), 1 Leon. 70; *Barne's Case* (1620), 2 Roll. Rep. 157; *Kendal's Case* (1695), 5 Mod. Rep. 78; *Bushell's Case, supra*, at p. 137; *Hutchins* v. *Player* (1663), O. Bridg. 272, 276; *Warman's Case* (1778), 2 Wm. Bl. 1204; *Chancey's (Sir William) Case* (1611), 12 Co. Rep. 82; *R.* v. *Bethel* (1695), 5 Mod. Rep. 19; *R.* v. *Winton* (1792), 5 Term Rep. 89; *R.* v. *Suddis* (1801), 1 East, 306; *Ex parte Krans* (1823), 1 B. & C. 258; *Watson's (Leonard) Case* (1839), 9 Ad. & El. 731; *R.* v. *Richards* (1844), 5 Q. B. 926; *Ex parte Besset* (1844), 6 Q. B. 481; *R.* v. *Mount* (1875), L. R. 6 P. C. 283, at p. 287; *Re Matthews* (1860), 12 I. C. L. R. 233, 241; *R.* v. *Jackson*, [1891] 1 Q. B. 671.

(*l*) *R.* v. *Roberts* (1860), 2 F. & F. 272, where a return to a writ of *habeas*

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The consequence of an insufficient return, where the cause of the imprisonment does not appear specifically and certainly, will be either that the prisoner, because the cause returned of his imprisonment is too general, must be discharged, when, if the cause had been more particularly returned, he ought to have been remanded, or else he must be remanded, when, if the cause had been particularly returned, he ought to have been discharged (*m*). An insufficient return may, however, be amended by leave of the court (*n*).

**Committal by Parliament for contempt.**

**141.** Committal for contempt by either House of Parliament constitutes a good return to a writ of *habeas corpus* (*a*).

**Committal by court of record for contempt.**

**142.** Committal for contempt by a court of record affords a good return to a writ of *habeas corpus*, and a person committed by a court of record for contempt cannot obtain his discharge by *habeas corpus* (*b*) except where the commitment for contempt is bad in law (*c*).

**Return when production impossible.**

**143.** If it be impossible for the person to whom the writ is directed to produce the body of the person alleged to be in his custody by reason of his having parted with the custody of such person before the service of the writ, he must nevertheless make a return setting out the facts unequivocally and distinctly and showing the reason why he is unable to obey the writ (*d*). Such a return will constitute a good and sufficient return; for the object of the writ is not punitive, but remedial (*e*).

The fact that a prisoner whose production has been ordered has been discharged from custody before the return should be stated on the return, and in such event the cause of taking and detainer need not appear on the return (*f*).

**Procedure on return.**

**144.** When a return is made in obedience to the writ the return is first read, and motion may then be made for discharging or remanding the prisoner or amending or quashing the return (*g*). In cases where more than one writ has been granted arising out of

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*corpus* that a child under fourteen was not detained by or in the custody, power, or possession, or under the care or control of the defendant, or any person employed by him, was held to be evasive and insufficient, and bad on account of its ambiguity; see also *Re Matthews* (1860), 12 I. C. L. R. 233, 234.

(*m*) See *Bushell's Case* (1670), Vaugh. 135, *per* VAUGHAN, C.J., at p. 137.

(*n*) See p. 70, *post*.

(*a*) *Shaftsbury's* (*Earl*) *Case* (1677), 1 Mod. Rep. 144; *Sheriff of Middlesex's Case* (1840), 11 Ad. & El. 273; see also 2 Hawk. P. C., c. 15, s. 73, n., where the early cases as to the power of Parliament to convict in execution for contempt of privilege are collected; and title PARLIAMENT.

(*b*) *Ex parte Fernandez* (1861), 10 C. B. (N. S.) 3; *Re Clarke* (1842), 11 L. J. (Q. B.) 75. As to contempt of court, see generally title CONTEMPT OF COURT, Vol. VII., pp. 279—325.

(*c*) *Hammond* v. *Howell* (1674), 1 Mod. Rep. 184.

(*d*) *Barnardo* v. *Ford, Gossage's Case*, [1892] A. C. 326; *R.* v. *Winton* (1792), 5 Term Rep. 89; *R.* v. *Wright* (1731), 2 Stra. 915.

(*e*) *Barnardo* v. *Ford, Gossage's Case, supra*, overruling *R.* v. *Barnardo* (1889), 23 Q. B. D. 305, C. A.

(*f*) *R.* v. *Gavin* (1848), 15 Jur. 329, n.; see also *R.* v. *Spencer* (1778), 1 Gude, Crown Practice, 278; *R.* v. *Bethuen* (1738), Andr. 281; *Re Thompson, R.* v. *Woodward* (1889), 5 T. L. R. 601.

(*g*) Crown Office Rules, r. 224.

one matter the return to each writ must be read in the first instance before argument on any particular case (*h*).

When a prisoner is brought up by *habeas corpus* the counsel for the prisoner is first heard, then the counsel for the Crown, and then one counsel for the prisoner in reply (*i*).

Evidence to controvert return.

**145.** The facts set out in the return need not in the first instance be supported by affidavit; for until impeached they are to be regarded as true (*k*). Where, however, there is ambiguity on the face of the return, the return is evasive and bad unless it be sufficiently explained and verified by affidavit (*l*).

The truth of a return in criminal cases cannot be traversed or impeached by affidavit, though matters may be stated on affidavit in confession and avoidance of the facts alleged in the return (*m*). Thus, when the return states that the party who is alleged to be unlawfully detained is in execution after sentence on indictment on a criminal charge, the return cannot be controverted (*n*). For a false return an action lies at common law (*o*); and if it has been knowingly and intentionally made, it would seem that its truth may be controverted by affidavit on a motion for an attachment or on a motion to quash the return (*p*), though an attachment will not be granted against a party who has unintentionally misrepresented immaterial matters on the return (*q*).

In cases other than for some criminal or supposed criminal matter, and excepting cases of imprisonment for debt or by process in any civil suit, the judge is by statute empowered to inquire into the truth of the facts set forth in the return (*r*). In such cases, although the return is good and sufficient in law, it is lawful for the court or judge before whom the writ may be returnable to proceed to examine into the truth of the facts set forth in the return by affidavit or by affirmation, in cases where an affirmation is allowed by law (*s*). If such writ be returned before a

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(*h*) *R.* v. *Batcheldor* (1839), 1 Per. & Dav. 516, *per* Lord DENMAN, C.J., at p. 517. In that case twelve writs of *habeas corpus* had been granted arising out of the same matter, and the cases of the twelve prisoners resolving themselves into two classes, two returns, each representing a different class of the cases of the prisoners, were read (see Fry's Report of the *Case of the Canadian Prisoners*, p. 31).

(*i*) Crown Office Rules, r. 226; see also *Wilson's* (*Carus*) *Case* (1845), 7 Q. B. 984.

(*k*) *Watson's* (*Leonard*) *Case* (1839), 9 Ad. & El. 731.

(*l*) *R.* v. *Roberts* (1860), 2 F. & F. 272.

(*m*) *Re Clarke* (1842), 2 Q. B. 619; *R.* v. *Rogers* (1823), 3 Dow. & Ry. (K. B.) 607; *R.* v. *Dunn* (1840), 12 Ad. & El. 599; *Re Douglas* (1842), 12 L. J. (Q. B.) 49; *R.* v. *Mallinson* (1851), 16 Q. B. 367. It was formerly held that the return to a *habeas corpus* could be traversed by plea (*De Vine's Case* (1456), cited O. Bridg. 288).

(*n*) *R.* v. *Suddis* (1801), 1 East, 306; *Wilson's* (*Carus*) *Case*, *supra*, at p. 1006; *Ex parte Lees* (1858), E. B. & E. 828; *Re Newton* (1855), 16 C. B. 97.

(*o*) *Re Clarke*, *supra*; *R.* v. *Rogers*, *supra*; *Re Douglas*, *supra*.

(*p*) *Watson's* (*Leonard*) *Case*, *supra*, *per* Lord DENMAN, C.J., at p. 805; *Crawford's Case* (1849), 13 Q. B. 613.

(*q*) *Watson's* (*Leonard*) *Case*, *supra*.

(*r*) Habeas Corpus Act, 1816 (56 Geo. 3, c. 100), ss. 3, 4; see also *Ex parte Beeching* (1825), 4 B. & C. 136.

(*s*) Habeas Corpus Act, 1816 (56 Geo. 3, c. 100), s. 3.

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judge and it appears doubtful to him on such examination whether the material facts set forth in the return or any of them be true or not, he may admit to bail the person confined or restrained on recognisance to appear in court, and he is to transmit into court the writ and return, together with such recognisance, affidavits and affirmations, and thereupon the court may proceed to examine into the truth of the facts set forth in the return in a summary way by affidavit or affirmation, and order and determine touching the discharging, bailing or remanding the party (*t*). The like proceeding may be had in the court for controverting the truth of the return, although such writ be awarded by the court itself or be returnable therein (*a*).

When a person has been brought up on a writ of *habeas corpus* issued at common law in a non-criminal case he may by affidavit controvert the truth of the facts stated in the return (*b*).

When the return is made during vacation, a judge has power to refer the case to the court to be heard during the ensuing sittings (*c*).

On the return affidavits will not generally be allowed to show that the sentence of the court under which the prisoner is detained was passed by the court without jurisdiction (*d*). Nor can the question be raised by affidavit showing that an alleged offence was not committed within the jurisdiction of the committing magistrate (*e*).

In non-criminal cases the Habeas Corpus Act, 1816, enables the return to be controverted (*f*), and a total absence of jurisdiction, or matters in excess of jurisdiction, may be alleged and proved by affidavit, but facts alleged on the return which were within the jurisdiction of a court cannot be controverted (*g*).

Amendment of return.

**146.** The return may be amended, or another return may be substituted for it by leave of the court or judge (*h*). A defect in form or averment in fact in the return may be amended before the return is filed (*i*).

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(*t*) Habeas Corpus Act, 1816 (56 Geo. 3, c. 100), s. 3.

(*a*) *Ibid.*, s. 4.

(*b*) *Ex parte Beeching* (1825), 4 B. & C. 136.

(*c*) *Re Turner* (1846), 15 L. J. (M. C.) 140. This course is not infrequently adopted in practice in important or difficult cases.

(*d*) *Brenan's Case* (1847), 10 Q. B. 492.

(*e*) *Re Smith* (1858), 3 H. & N. 227, *per* MARTIN, B., at p. 232; *Re Newton* (1855), 16 C. B. 97; *R.* v. *Mallinson* (1851), 16 Q. B. 367; see, however, *Re Bailey* (1854), 3 E. & B. 607; *Re Baker* (1857), 2 H. & N. 219; approved in *Re Authers* (1889), 22 Q. B. D. 345.

(*f*) 56 Geo. 3, c. 100, ss. 3, 4.

(*g*) See *Wilson's (Carus) Case* (1845), 7 Q. B. 984, *per* Lord DENMAN, C.J., at p. 1008; *Re Clarke* (1842), 2 Q. B. 619; *Re Thompson* (1860), 6 H. & N. 193; *Sheriff of Middlesex's Case* (1840), 11 Ad. & El. 273.

(*h*) Crown Office Rules, r. 223. As to the power of the court to order the return to be amended, see *Hawkeridge's Case* (1616), 12 Co. Rep. 129; *Chambers' Case* (1628), Cro. Car. 133; *Re Power* (1826), 2 Russ. 583; *Watson's (Leonard) Case* (1839), 9 Ad. & El. 731; *Re Clarke* (1842), 2 Q. B. 619, *per* Lord DENMAN, C.J., at p. 624. R. S. C., Ord. 28, as to amendment, applies, as far as applicable, to all civil proceedings on the Crown side (Crown Office Rules, r. 260).

(*i*) *Anon.* (1673), 1 Mod. Rep. 103.

Custody pending hearing.

**147.** Upon the return and the production of the party on whose behalf it was issued the authority under which the original commitment took place is suspended, and until the case is finally disposed of the custody of the prisoner is under the control and direction of the court to which the return is made (*k*). The prisoner is detained not under the original commitment, but under the authority of the writ (*l*). Pending the hearing the court has power, even after the return is filed, to remand the applicant for the writ to the prison where he is in custody or to any other place of commitment and to bring him up from time to time by rule of court until he is either bailed, discharged or remanded (*m*). The court also has power to bail the prisoner *de die in diem* pending the argument as to the sufficiency of the return to the writ (*n*).

Discharge from custody.

**148.** Where, after argument, the return is found to be bad or insufficient, the party on whose behalf the writ was issued is entitled to be discharged from custody (*o*).

The court is not bound to order a prisoner to be discharged merely on the ground of irregularity in the form of the return, provided that a good cause of commitment is disclosed on the return (*p*).

When a prisoner who was improperly committed obtains his discharge on *habeas corpus* the order of commitment is not quashed, for the prisoner is discharged or remanded upon the return alone (*q*).

Rearrest after discharge.

**149.** A prisoner who has been discharged from illegal custody on *habeas corpus* cannot be again imprisoned or committed for or in respect of the same offence (*r*); but is not privileged from being immediately rearrested on criminal process in relation to some matter other than that in respect of which he has been discharged, though he is privileged from re-arrest on civil process whilst returning to his place of abode from the court discharging him (*s*).

Under the Habeas Corpus Act, 1679 (*t*), no person is at any time to be again imprisoned or committed for the same offence by any person whatsoever other than by the legal order and process of such court wherein he shall be bound by recognisance to appear or other court having jurisdiction of the cause, and anyone unduly re-committing such discharged person for the same offence, or anyone

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(*k*) *R.* v. *Bethel* (1695), 5 Mod. Rep. 19; *Re Kaine* (1852), 14 How. (55 U. S.) 103, 134; *Harwood's Case* (1672), 1 Vent. 178.

(*l*) *R.* v. *Bethel, supra.*

(*m*) *Anon.* (1678), 1 Ventr. 330; *Peyton's* (*Sir Robert*) *Case* (1680), 1 Vent. 346.

(*n*) *Bronker's* (*Sir William*) *Case* (1647), Sty. 16; *R.* v. *Bethel, supra, per* HOLT, C.J., at p. 23.

(*o*) *Hawkeridge's Case* (1616), 12 Co. Rep. 129; *Re Howard* (1844), 2 Dow. & L. 536; *Re Authers* (1889), 22 Q. B. D. 345.

(*p*) *R.* v. *Bethel* (1695), 5 Mod. Rep. 19; *Shieldes' Case* (1639), March, 52; *R.* v. *Judd* (1788), 2 Term Rep. 255.

(*q*) *Bushell's Case* (1670), Vaugh. 135; see also *Glanvile's Case* (1614), Moore (K. B.), 838.

(*r*) *Search's Case* (1587), 1 Leon. 70.

(*s*) *Re Douglas* (1842), 12 L. J. (Q. B.) 49; see also *A.-G. for the Colony of Hong Kong* v. *Kwok-a-Sing* (1873), L. R. 5 P. C. 179.

(*t*) 31 Car. 2, c. 2, s. 5.

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knowingly aiding or assisting therein, is liable to a penalty of £500 payable to the aggrieved party.

This provision prevents a person who has been brought up and discharged from custody on giving bail and entering into his own recognisance from being again arrested for the same offence and obliged to sue out a second writ (*a*). The provision would seem also to apply to cases where a prisoner has been discharged on *habeas corpus* unconditionally upon the ground that the warrant on which he is detained shows no valid cause for his detention, but it can only apply when the second arrest is substantially for the same cause as the first, so that the return to the second writ raises for the opinion of the court the same question with reference to the validity of the grounds of detention as the first (*b*).

There is, therefore, no ground for discharging from custody under a second valid warrant merely because the prisoner has been previously discharged on *habeas corpus* from an unlawful imprisonment (*c*). Where, however, a person has been discharged on *habeas corpus*, and after such discharge is again arrested for the same cause or upon the same grounds or pretext, an attachment will be granted against the party causing him to be so arrested (*d*).

Order after hearing.

**150.** Upon the argument before the court on the return the party in whose favour judgment is given must forthwith draw up an order in accordance with the decision of the court at the Crown Office (*e*). The writ, the return, and the affidavits used at the hearing must be filed at the Crown Office (*f*). When the order has been made by a judge at chambers, the writ and return, with the affidavits and a copy of the judge's order, must be forthwith transmitted to the Crown Office to be filed (*g*).

(v.) *Enforcing Obedience to the Writ.*

Attachment for disobedience.

**151.** The appropriate mode of enforcing obedience to a writ of *habeas corpus* is by attachment. When a writ is disregarded and no return is made thereto, the party to whom the writ is directed, even if he is a peer (*h*), will be liable to attachment (*i*).

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(*a*) See *A.-G. for the Colony of Hong Kong* v. *Kwok-a-Sing* (1873), L. R. 5 P. C. 179, 201.

(*b*) *Ibid.*, at p. 202.

(*c*) *Ibid.*

(*d*) *Search's Case* (1587), 1 Leon. 70.

(*e*) Crown Office Rules, r. 227.

(*f*) *Ibid.*

(*g*) *Ibid.*

(*h*) *R.* v. *Colvin* (1724), 8 Mod. Rep. 226; *R.* v. *Barber, Ex parte Bosen* (1758), 2 Keny. 289; *R.* v. *Wright* (1731), 2 Stra. 915; *R.* v. *Winton* (1792), 5 Term Rep. 89; *R.* v. *Gavin* (1848), 15 Jur. 329, n.; *Re Thompson, R.* v. *Woodward* (1889), 5 T. L. R. 565; *R.* v. *Durmill, Ex parte Easingwold Union* (1899), *Times*, May 31st, 1899.

(*i*) *R.* v. *Ferrers* (*Earl*) (1757), 1 Burr. 631, where the question was raised whether an attachment could be issued by the Court of King's Bench against a peer during the sitting of Parliament for disobedience to a writ of *habeas corpus*, or whether he was protected by privilege of peerage. Lord MANSFIELD, C.J., in the House of Lords, spoke in support of the jurisdiction of his court, and the injustice and inconvenience of allowing such a privilege in criminal cases and

If a writ of *habeas corpus* be disobeyed by the person to whom it is directed, application may be made to the court on an affidavit of service and disobedience for an attachment for contempt (*k*), or an application may be made to a judge in chambers for a warrant for the apprehension of the person in contempt to be brought before him, or some other judge, to be bound over to appear in court to answer for his contempt or to be committed to prison for want of bail (*l*).

Modes of enforcing obedience.

This application to a judge in chambers for a warrant can be made during vacation or where there is no divisional court available, and in such event takes the place of an application to the court for an attachment (*m*).

In order to compel obedience a search must be made at the Crown Office for the return to the writ, and if no return be found application may be made, upon affidavit thereof, for an attachment (*n*).

Attachment may be granted against a person who intentionally makes a false return to a writ of *habeas corpus*, but an unintentional misrepresentation upon a return is not ground for attachment (*o*).

An insufficient return constitutes a contempt, and the party knowingly making it is liable to attachment (*p*). Proof of a personal service of the original writ of *habeas corpus* is essential before attachment for disobedience will be granted (*q*).

### (vi.) *Appeal*

No appeal in criminal cases.

**152.** There is no appeal from the decision of the King's Bench Division granting or refusing a writ of *habeas corpus* in any criminal cause or matter (*r*). Thus, where a person has on the hearing of

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breaches of the peace. Lord HARDWICKE spoke to the same effect, and proposed that in order to put an end to all doubt about it for the future, the Lords should come to a resolution, and the following resolution was accordingly ordered to be entered on their journal: "7 Februarii, 1757. It is ordered and declared that no peer or lord of parliament hath privilege against being compelled by process of the Courts of Westminster Hall to pay obedience to a writ of *habeas corpus* directed to him." A similar order and declaration was on June 8th, 1757, ordered to be entered upon the roll of the Standing Orders of the House of Lords. A writ of attachment to enforce obedience to the writ of *habeas corpus* was subsequently issued by the Court of King's Bench against Lord Ferrers (*ibid.*, at p. 633).

(*k*) Crown Office Rules, r. 221; for form of affidavit of service of writ of *habeas corpus*, see *ibid.*, Appendix, Form No. 179; for the procedure on attachment for contempt of court, see *ibid.*, rr. 240—242; *ibid.*, Appendix, Form No. 190; and title CONTEMPT OF COURT, Vol. VII., pp. 307 *et seq.*

(*l*) *Ibid.*, r. 221; compare *Ex parte Wyatt* (1836), 5 Dowl. 389; *Re Fitzpatrick* (1872), 6 I. R. C. L. 507.

(*m*) See 56 Geo. 3, c. 100, s. 2.

(*n*) *Ex parte Harrison* (1805), 2 Smith, K. B. 408. For the form of affidavit of search at Crown Office for return to writ of *habeas corpus*, see Crown Office Rules, Appendix, Form No. 180.

(*o*) *Watson's (Leonard) Case* (1839), 9 Ad. & El. 731.

(*p*) *R.* v. *Winton* (1792), 5 Term Rep. 89; *Watson's (Leonard) Case, supra; Re Matthews* (1859), 12 I. C. L. R. 233.

(*q*) *R.* v. *Rowe* (1894), 71 L. T. 578.

(*r*) *Ex parte Woodhall (Alice)* (1888), 20 Q. B. D. 832, C. A. The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47, enacted that no appeal shall lie from any

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the return to a writ obtained his discharge from custody no appeal lies to the Court of Appeal from the decision of the court ordering his discharge, and the Court of Appeal has no jurisdiction to entertain an appeal in such a case (*s*). Nor does an appeal lie from a decision of the court refusing a writ of *habeas corpus* to a person who is in custody or a commitment for extradition in respect of an alleged crime (*t*). Where, however, an application for a writ is refused by one court the applicant has in every case the right to renew his application in another court (*a*).

Appeal in non-criminal cases.

**153.** Appeal lies to the Court of Appeal and thence to the House of Lords from an order absolute for the issue of a writ of *habeas corpus* in non-criminal cases (*b*). Thus, in cases relating to the custody of infants appeal lies from an order of the King's Bench Division directing the issue of a writ to bring up the infant before the court (*c*). But though an appeal lies when an order has been made for the issue of a writ in such a case, the Court of Appeal will not lightly interfere with it (*d*).

Appeal also lies from an order for an attachment for disobedience to the writ (*e*), and, apparently, from the refusal to grant a writ in non-criminal cases (*f*).

There is no appeal to the Court of Appeal from an order of the King's Bench Division made on the return to a writ discharging a prisoner out of custody (*g*). Appeal, however, lies to the Judicial Committee of the Privy Council from the judgment of the supreme court of a colony ordering the discharge of a prisoner out of custody on a writ of *habeas corpus* (*h*).

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judgment of any judge of the High Court in any criminal cause or matter, except for some error of law apparent upon the record as to which no question had been reserved for consideration under the Crown Cases Act, 1848 (11 & 12 Vict. c. 78). This section does not apply to appeals from a judge at chambers; see *Ex parte Pulbrook*, [1892] 1 Q. B. 86, 90. As to what is a criminal cause or matter within the meaning of s. 47, see *Seaman* v. *Burley*, [1896] 2 Q. B. 344, C. A.; *Derby Corporation* v. *Derbyshire County Council*, [1897] A. C. 552.

(*s*) *Cox* v. *Hakes* (1890), 15 App. Cas. 506, where the House of Lords reversed the decision of the Court of Appeal (20 Q. B. D. 1).

(*t*) *R.* v. *Weil* (1882), 9 Q. B. D. 701, C. A.; *Ex parte Woodhall* (*Alice*) (1888), 20 Q. B. D. 832, C. A.

(*a*) See *Ex parte Partington* (1845), 2 Dow. & L. 650; *Cox* v. *Hakes*, *supra*, *per* Lord HALSBURY, L.C., at p. 514; see also p. 62, *ante*.

(*b*) *Barnardo* v. *Ford*, *Gossage's Case*, [1892] A. C. 326.

(*c*) *Barnardo* v. *McHugh*, [1891] A. C. 388, affirming *R.* v. *Barnardo* (*Jones's Case*), [1891] 1 Q. B. 194. C. A. In *Barnardo* v. *Ford*, *Gossage's Case*, [1892] A. C. 326, affirming *R.* v. *Barnardo* (1890), 23 Q. B. D. 283, C. A., the House of Lords held that the issue of a writ of *habeas corpus* in cases relating to the custody of children is an order from which appeal lies to the Court of Appeal under s. 19 of the Judicature Act, 1873 (36 & 37 Vict. c. 66).

(*d*) See *Barnardo* v. *Ford*, *Gossage's Case*, *supra*, *per* Lord HERSCHELL, at p. 339.

(*e*) *R.* v. *Barnardo*, *supra*.

(*f*) See *Ex parte Cox* (1887), 20 Q. B. D. 1, C. A. In *Cox* v. *Hakes*, *supra*, the House of Lords did not decide the point. In *R.* v. *Jackson*, [1891] 1 Q. B. 671, C. A., where the question arose, it was not argued in the Court of Appeal (see *ibid.*, 671, n. (2)).

(*g*) *Cox* v. *Hakes*, *supra*.

(*h*) *A.-G. for the Colony of Hong Kong* v. *Kwok-a-Sing* (1873), L. R. 5 P. C. 179; *R.* v *Mount* (1875), L. R. 6 P. C. 583.

**154.** Where the liberty of the subject or the custody of infants is concerned appeal lies, without leave of the judge or of the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by a judge (*i*).

Appeal by motion.

**155.** In cases on the Crown side in which appeal lies from a judge at chambers to a divisional court the appeal is by motion (*k*). This motion must be made within eight days after the decision appealed against or on the first day on which any court to which such appeal can be made is sitting after the expiration of such eight days (*l*).

Costs of appeal.

**156.** On an appeal to the Court of Appeal from a judgment of the King's Bench Division making absolute a rule for a writ of *habeas corpus*, the Court of Appeal has jurisdiction to give the costs of the appeal to the party who has succeeded on the appeal (*m*). The Court of Appeal in such a case has discretionary power to award to the successful party the costs in the court below (*n*).

SUB-SECT. 3.—*Writs of Habeas Corpus other than Habeas Corpus ad Subjiciendum.*

(i.) *Habeas Corpus ad Testificandum.*

*Habeas corpus ad testificandum.*

**157.** The object of this writ is to enable a person who is in legal custody in prison to be brought up before a court for the purpose of giving evidence as a witness (*o*).

The judges of the High Court are authorised by statute to award writs of *habeas corpus* for the purpose of bringing up prisoners before any court of record in England or Ireland to be examined as witnesses (*p*), or before an official or special referee or any arbitrator or umpire (*q*), or before courts-martial (*r*).

Applications for writs of *habeas corpus ad testificandum* must be made on affidavit to a judge at chambers (*s*), and the writ may be awarded whether the person whose evidence is required is detained in custody under civil or criminal process. It is, however, now only necessary to resort to the writ when the prisoner is in gaol under

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(*i*) See Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 1 (b) (i.); *Ex parte Emerson* (1895), 11 T. L. R. 218; *R.* v. *Pinckney*, [1904] 2 K. B. 84, C. A.

(*k*) Crown Office Rules, r. 267.

(*l*) *Ibid.*

(*m*) *Ex parte Cox* (1887), 20 Q. B. D. 1, 37, n.

(*n*) *Ibid.*, as reported 57 L. J. (Q. B.) 98, *per* Lord ESHER, M.R., at p. 113. In *Barnardo* v. *Ford*, *Gossage's Case*, [1892] A. C. 326, in which there was an appeal to the House of Lords from an order of the Court of Appeal affirming an order of the Queen's Bench Division making absolute an order for the issue of a writ of *habeas corpus*, the House of Lords affirmed the order appealed from and dismissed the appeal with costs.

(*o*) 3 Bl. Com. 130; Bac. Abr. tit. Habeas Corpus.

(*p*) Habeas Corpus Act, 1804 (44 Geo. 3, c. 102).

(*q*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 18 (2).

(*r*) Habeas Corpus Act, 1803 (43 Geo. 3, c. 140).

(*s*) Crown Office Rules, r. 228; see also *Jenks* v. *Ditton*, [1897] W. N. 56. For the forms of affidavit for writ of *habeas corpus ad testificandum* and the form of writ, see Crown Office Rules, Appendix, Forms Nos. 181—183.

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process in any civil matter, for a Secretary of State or a judge of the King's Bench Division is by statute empowered upon application by affidavit to issue a warrant or order to bring up any prisoner in gaol under any sentence or commitment, except under civil process, to be examined as a witness (*t*). Judges of county courts have similar power (*a*).

(ii.) *Habeas Corpus ad Respondendum.*

*Habeas corpus ad respondendum.*

**158.** The object of this writ is to bring up prisoners who are detained in custody under civil or criminal process before magistrates or courts of record for trial or examination on any other charge (*b*). But persons who are in custody and under recognisances to come up for trial for any criminal offence can now be brought up on an indictment by order without a writ of *habeas corpus ad respondendum* (*c*).

The application for this writ must be made on affidavit to a judge at chambers (*d*).

When an attachment has been obtained against a prisoner who is in gaol, he may be brought up by writ of *habeas corpus* before the court or a judge at chambers, to be there charged with attachment (*e*).

(iii.) *Habeas Corpus ad Deliberandum and Recipias.*

*Habeas corpus ad deliberandum* and *recipias.*

**159.** The object of these writs is to enable the removal of prisoners from one custody to another for the purpose of their trial (*f*). These writs are in practice rarely resorted to, modern legislation having facilitated the removal of prisoners from one custody to another for various purposes (*g*).

Indictments found by a grand jury of any city or town corporate,

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(*t*) Criminal Procedure Act, 1853 (16 & 17 Vict. c. 30), s. 9.

(*a*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 112.

(*b*) Habeas Corpus Act, 1803 (43 Geo. 3, c. 140); *Ex parte Griffiths* (1822), 5 B. & Ald. 730; *R.* v. *Day* (1862), 3 F. & F. 526. Formerly the writ was used where one person had a cause of action against another who was in custody under process of an inferior court to enable the prisoner to be removed so as to charge him with the new cause of action in a superior court (3 Bl. Com. 130; Bac. Abr. tit. Habeas Corpus (A) ).

(*c*) Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), s. 10.

(*d*) Crown Office Rules, r. 228. For the forms of writs of *habeas corpus* to bring a prisoner before justices of the peace to answer a charge and to bring up a prisoner to plead to an indictment or for trial, see Crown Office Rules, Appendix, Forms Nos. 187, 188.

(*e*) See Short and Mellor, Practice of the Crown Office, 2nd ed., p. 361. For the form of affidavit to be used in support of the motion for *habeas corpus* in such case, and of the writ of *habeas corpus*, see Crown Office Rules, Appendix, Forms Nos. 191, 192.

(*f*) See 3 Bl. Com. 130; Bac. Abr. tit. Habeas Corpus. The Habeas Corpus Act, 1679 (31 Car. 2, c. 2), s. 8, prohibited the removal of any subject of this realm who is committed to any prison or in custody of any officer for any criminal matter except by *habeas corpus* or other legal writ or in certain cases specified.

(*g*) See Central Criminal Court Act, 1856 (19 & 20 Vict. c. 16), s. 5; Prison Act, 1865 (28 & 29 Vict. c. 126), ss. 63—65; Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), s. 10; Prison Act, 1877 (40 & 41 Vict. c. 21), s. 28; Prison Act, 1898 (61 & 62 Vict. c. 41), s. 11.

or inquisitions taken before the coroner, may be ordered by any court of oyer and terminer or general gaol delivery for the county or city to be filed with the proper officer of the next adjoining county and the defendants removed by writ of *habeas corpus* issued by the said court (*h*). The judges of the King's Bench Division or justices of oyer and terminer or general gaol delivery may cause persons in custody for offences committed within the county of any city or town corporate to be removed by proper writs of *habeas corpus* into the custody of the sheriff of the next adjoining county for trial (*i*).

Applications for writs of *habeas corpus ad deliberandum* and *recipias* must be made to a judge at chambers (*k*). Two writs must be applied for, the writ *ad deliberandum* to the gaoler to deliver the prisoner, and the writ *recipias* to the other gaoler to receive him (*l*).

## SECT. 4.—*Mandamus.*

### SUB-SECT. 1.—*Nature of the Writ of Mandamus.*

What mandamus is.

**160.** The writ of mandamus is a high prerogative writ of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior court, requiring him or them to do some particular thing therein specified which appertains to his or their office, is in the nature of a public duty, and is consonant to right and justice. Its purpose is to supply defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right (*a*); and it may issue in cases where, although there is an alternative legal remedy, yet such mode of redress is less convenient, beneficial and effectual (*b*).

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(*h*) Counties of Cities Act, 1798 (38 Geo. 3, c. 52), s. 3.
(*i*) *Ibid.*, s. 4.
(*k*) Crown Office Rules, r. 228.
(*l*) *Ibid.*, r. 230. For the forms of these writs, see Crown Office Rules, Appendix, Forms Nos. 185, 186.

(*a*) 3 Bl. Com. 110; Com. Dig. tit. Mandamus; *R.* v. *Canterbury* (*Archbishop*) *and London* (*Bishop*) (1812), 15 East, 117, *per* Lord ELLENBOROUGH, at p. 136.

"By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done" (*Re Nathan, R.* v. *Inland Revenue Commissioners* (1884), 12 Q. B. D. 461, C. A., *per* BOWEN, L.J., at p. 478).

"When there is no specific remedy the court will grant a mandamus that justice may be done" (*R.* v. *Bank of England* (1780), 2 Doug. (K. B.) 524, *per* Lord MANSFIELD, at p. 526). "The construction of that sentence is this: Where there is no specific remedy and by reason of the want of that specific remedy justice cannot be done unless a mandamus is to go, then a mandamus will go" (*Re Nathan, R.* v. *Inland Revenue Commissioners, supra, per* BRETT, M.R., at p. 473).

(*b*) 3 Bl. Com. 110; *R.* v. *Bank of England* (1819), 2 B. & Ald. 620, *per* BAYLEY, J., at p. 622; *Re Barlow* (1861), 30 L. J. (Q. B.) 271; and see *R.* v. *Thomas*, [1892] 1 Q. B. 426, where, although there was an appeal to quarter sessions in the matter in question, yet a mandamus was granted as being, in the circumstances, the more satisfactory and effectual remedy.

SECT. 4. **Mandamus.**

SUB-SECT. 2.—*Duties in respect of which the Writ of Mandamus will lie.*

(i.) *In General.*

Grant is discretionary.

**161.** The grant of a writ of mandamus is a matter for the discretion of the court (*c*). It is not a writ of right (*d*) and it is not issued as a matter of course (*e*). Accordingly, the court may grant the writ even though the right in respect of which it is applied for appears to be doubtful (*f*), and, on the other hand, the writ may be refused, not only upon the merits, but also by reason of the special circumstances of the case (*g*). The court will take a liberal view in determining whether or not the writ shall issue, not scrupulously weighing the degree of public importance attained by the matter which may be in question, but applying this remedy in all cases where, upon a reasonable construction, it can be shown to be relevant (*h*). Thus, the writ has been held to lie for the surrender of the regalia of a corporation (*i*); to oblige corporate bodies to affix their common seal (*k*); to compel a corporation to pay a sum

(*c*) *R.* v. *Chester* (*Bishop*) (1786), 1 Term Rep. 396; *R.* v. *Lambourn Valley Rail. Co.* (1888), 22 Q. B. D. 463.

"But that discretion must be governed by certain principles" (*R.* v. *London Corporation* (1786), 1 Term Rep. 423, *per* ASHHURST, J., at p. 425). "It is true that, in the past, the court has laid down certain rules for future guidance, according to which it will or will not grant this writ. It must, however, be remembered that it by no means follows that, because the court has in many cases refused to grant the writ, it had not power to do so within the rules which govern its action. The court may well have the power, but in a particular case may think that it is not advisable to grant a writ of mandamus, which is discretionary" (*R.* v. *Leicester Union*, [1899] 2 Q. B. 632, *per* DARLING, J., at pp. 637, 638).

(*d*) *R.* v. *All Saints, Wigan* (*Churchwardens*) (1876), 1 App. Cas. 611.

(*e*) *Julius* v. *Oxford* (*Bishop*) (1880), 5 App. Cas. 214, *per* Lord BLACKBURN, at p. 246.

(*f*) *R.* v. *All Saints, Wigan* (*Churchwardens*), *supra*, *per* Lord CHELMSFORD, at p. 620: "So in cases where the right, in respect of which a rule for a mandamus has been granted, upon showing cause appears to be doubtful, the court frequently grants a mandamus in order that the right may be tried upon the return; this also is a matter of discretion." See also *R.* v. *London Corporation* (1733), 2 Term Rep. 182, n.

(*g*) *R.* v. *All Saints, Wigan* (*Churchwardens*), *supra*, *per* Lord HATHERLEY, at p. 622: "Upon a prerogative writ there may arise many matters of discretion which may induce the judges to withhold the grant of it, matters connected with delay, or possibly with the conduct of the parties."

*R.* v. *Garland* (1870), L. R. 5 Q. B. 269, where the court rested the refusal of the writ "entirely on the special circumstances of the case," COCKBURN, C. J. (at p. 272), explaining those circumstances to be that "the effect of granting the mandamus would be most prejudicial; it would simply be that the trustees would be enabled to evade the discharge of a duty which a court of equity would and must enforce against them." See also *Croydon Corporation* v. *Croydon Rural Council*, [1908] 2 Ch. 321, C. A. (levying rates for expenses incurred in other years).

(*h*) *Rochester Corporation* v. *R.* (1858), E. B. & E. 1024, Ex. Ch., *per* MARTIN, B., at p. 1030: "Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable"; *R.* v. *Barker* (1762), 3 Burr. 1265, *per* Lord MANSFIELD, at p. 1267: "The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed."

(*i*) 3 Bl. Com. 110; but compare *R.* v. *Todd* (1838), 2 Jur. 565.

(*k*) 3 Bl. Com. 110; *R.* v. *Windham* (1776), 1 Cowp. 377; *R.* v. *Beeston* (1790), 3 Term Rep. 592, *per* Lord KENYON, C.J., at p. 594.

of money pursuant to an agreement which could be enforced by action (*l*); to command a lord of a manor to hold a court leet (*m*) and a court baron (*n*) and a mayor and corporation to exercise the ancient privilege of holding a court for determining suits notwithstanding long disuse (*o*); to permit the use of a public building for the assembly of a court leet (*p*); to burgesses to attend a court leet to make a jury (*q*); and to the lord of a manor to admit a copyholder (*r*).

In particular a writ of mandamus will lie to restore, admit or elect to an office of a public nature; for the delivery up, production and inspection of public documents; to enforce statutory rights and duties; to require public officials and public bodies to carry out their duties; and to command inferior tribunals to exercise jurisdiction (*s*).

(ii.) *Restoration, Admission and Election to Offices.*

Restoration to office.

**162.** A writ of mandamus will lie to compel the restoration of a person to an office or franchise, whether spiritual or temporal, of which he has been wrongfully dispossessed, provided such office or franchise is of a public nature (*a*); as for example to the office of mayor, alderman, recorder, town clerk, burgess or other municipal position (*b*), to academical degrees, or to the fellowship of a college where there is no visitor (*c*), or to the offices of parish clerk and sexton (*d*).

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(*l*) *R.* v. *Bristol and Exeter Rail. Co.* (1845), 3 Ry. & Can. Cas. 777, where the agreement was for payment of a sum by a railway company in settlement of a claim for damages, but could not be enforced by action because it was not under seal.

(*m*) *R.* v. *Colebrooke* (1757), 2 Keny. 163; *R.* v. *Milverton* (*Lord of the Hundred*) (1835), 3 Ad. & El. 284. As to courts leet, see generally titles COPYHOLDS, Vol. VIII., p. 12; COURTS, Vol. IX., p. 215.

(*n*) *R.* v. *Montacute* (1750), 1 Wm. Bl. 60. As to court baron, see generally titles COPYHOLDS, Vol. VIII., p. 12; COURTS, Vol. IX., p. 216.

(*o*) *R.* v. *Hastings Corporation* (1822), 5 B. & Ald. 692, n. (where the period of disuse was over thirty years); *R.* v. *Wells Corporation* (1836), 4 Dowl. 562 (where the period of disuse had extended over two centuries). See also *R.* v. *Havering-atte-Bower* (*Steward etc.*) (1822), 5 B. & Ald. 691. As to such courts, see generally title COURTS, Vol. IX., p. 130.

(*p*) *R.* v. *Ilchester Corporation* (1824), 2 B. & C. 764; *R.* v. *Grantham Corporation* (1770), 2 Wm. Bl. 716; but a mandamus to give the key of the town-hall to the lord of the manor, so that he could hold his usual court leet there, was refused, because there was no precedent (*R.* v. *Wigan Corporation* (1744), 1 Wils. 76).

(*q*) *Wigan* (*Rector*) *Case* (1744), 2 Stra. 1207; but no mandamus will go to specific jurors by name to appear to form a jury (*R.* v. *Bankes* (1764), 1 Wm. Bl. 452).

(*r*) *R.* v. *Hendon* (*Lord of the Manor*) (1788), 2 Term Rep. 484; *R.* v. *Rennett* (1788), 2 Term Rep. 197. In *R.* v. *Pitt* (1839), 10 Ad. & El. 272, however, a mandamus to the lord of a manor to accept a surrender of a copyhold was refused, as the Court of Chancery could compel the performance of all that ought to be done. See title COPYHOLDS, Vol. VIII., p. 105.

(*s*) See pp. 89 *et seq.*, *post*.

(*a*) 3 Bl. Com. 110; *R.* v. *Blooer* (1760), 2 Burr. 1043.

(*b*) Com. Dig. tit. Mandamus, A; *R.* v. *London Corporation* (1733), 2 Term Rep. 182, n. As to these offices, see generally title LOCAL GOVERNMENT.

(*c*) Com. Dig. tit. Mandamus, A; 3 Bl. Com. 110; see generally title EDUCATION. As to visitors, see title CHARITIES, Vol. IV., pp. 287 *et seq.*

(*d*) *R.* v. *Warren* (1776), 1 Cowp. 370; *Neale* v. *Bowles* (1835), 1 Har. & W.

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Admission to office.

**163.** A mandamus will also lie to admit to such an office or franchise a person who has a right thereto but has never had possession (*e*). The writ has accordingly been issued to admit to the office of alderman of the city of London a candidate duly elected at a court of wardmote (*f*); to admit to the office of registrar of a corporation the candidate who had obtained the majority of legal votes (*g*); to admit to the directorship of a registered company the candidate elected by a show of hands (*h*); and to an archdeacon to admit a duly elected churchwarden by swearing him in (*i*). When, however, the office in question is neither a corporate office nor a permanent one, but one which is merely temporary, depending upon the will of a fluctuating body, no mandamus will lie to restore or admit thereto (*j*).

Election to office.

**164.** A mandamus will lie to command an election to offices of a public nature in accordance with the rule that, whenever it is the duty of a person or corporation to do an act, the court will order it to be done (*k*), as to fill up a vacancy among the canons residentiary in a cathedral (*l*) or to elect churchwardens (*m*). No mandamus will, however, be granted to compel the election of members of an indefinite body (*n*).

Municipal elections.

If a municipal election, that is to say, an election to the office of mayor, alderman, councillor, or elective auditor of a borough (*o*), within the Municipal Corporations Act, 1882, is not held on the appointed day or within the appointed time, or on the day next

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584; *R.* v. *Smith* (1844), 5 Q. B. 614. As to these offices, see title ECCLESIASTICAL LAW.

(*e*) 3 Bl. Com. 110; Com. Dig. tit. Mandamus, A.

(*f*) *R.* v. *London Corporation* (1829), 4 Man. & Ry. (K. B.) 36, where it was claimed that the court of the lord mayor and aldermen had exclusive cognisance and jurisdiction concerning the election of any person to any city office at any such court of wardmote and that the Court of King's Bench had therefore no jurisdiction in the matter; but the court held that the jurisdiction of the Court of King's Bench was not excluded.

(*g*) *R.* v. *Bedford Level Corporation* (1805), 6 East, 356.

A mandamus to admit is granted "merely to enable the party to try his right, without which he would be left without any legal remedy. But the court have always looked much more strictly to the right of the party applying for a mandamus to be restored. In these cases he must show a *primâ facie* title" (*R.* v. *Jotham* (1790), 3 Term Rep. 575, *per* BULLER, J., at p. 577).

(*h*) *R.* v. *Government Stock Investment Co.* (1878), 3 Q. B. D. 442.

(*i*) *R.* v. *Lichfield* (*Archdeacon*) (1835), 5 Nev. & M. (K. B.) 42; *R.* v. *Sowter*, [1901] 1 K. B. 66.

(*j*) *Evans* v. *Hearts of Oak Benefit Society* (1866), 12 Jur. (N. S.) 163, where it was held that the secretaryship of the society was not an office in respect of which mandamus would lie; *R.* v. *St. Stephen's, Coleman Street* (*Vicar etc.*) (1844), 14 L. J. (Q. B.) 34 (organist). See also *R.* v. *Croydon Churchwardens* (1794), 5 Term Rep. 713; and *R.* v. *St. Nicholas, Rochester, Guardians* (1815), 4 M. & S. 324.

(*k*) *R.* v. *Fowey Corporation* (1824), 2 B. & C. 584, *per* ABBOTT, C.J., at p. 590.

(*l*) *Chichester* (*Bishop*) v. *Harward and Webber* (1787), 1 Term Rep. 650, *per* BULLER, J., at p. 652.

(*m*) *R.* v. *Wix* (*Inhabitants*) (1831), 2 B. & Ad. 197; *Re Barlow* (1861), 30 L. J. (Q. B.) 271; see generally title ECCLESIASTICAL LAW.

(*n*) *R.* v. *Fowey Corporation*, *supra*, where a rule *nisi* had been granted for a mandamus commanding the election of a "competent number of free burgesses of the borough," but was discharged.

(*o*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 7

after that day or the expiration of that time, or becomes void, the municipal corporation is not thereby dissolved or disabled from electing, but the High Court may, on motion, grant a mandamus for the election to be held on a day appointed by the court (*p*). The same provision applies to county councils, and to the chairmen, members, committees, and officers of such councils (*q*).

Office must be vacant.

**165.** A mandamus to restore, admit, or elect to an office will not be granted unless the office is vacant. If the office is in fact full, proceedings must be taken by way of *quo warranto* or election petition to oust the party in possession (*r*). A mandamus will go only on the supposition that there is nobody holding the office in question (*s*). A mandamus will, however, be issued commanding election to an office when, although there has been an election to the office in question, yet such election is void or merely colourable. The court will then consider that there has been in fact no election, and that the office is not therefore full (*a*). Apparently, too, the same view will be taken when the person in possession of the office is merely holding over (*b*).

(iii.) *Delivery up and Production and Inspection of Documents.*

Delivery up of documents.

**166.** A mandamus will lie commanding the delivery up (*c*) of public books and papers (*d*); as, to the clerk of a trade corporation

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(*p*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 70 (2), reproduced from stat. (1724) 11 Geo. 1, c. 4, s. 2, which is repealed by the Statute Law Revision Act, 1887 (50 & 51 Vict. c. 59).

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75. As to the procedure with reference to this provision, see s. 225 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), and p. 110, *post*. For instances of the application of the provisions of s. 70 (2) of the Municipal Corporations Act, 1882, see *Re Stratford-on-Avon Corporation* (1886), 2 T. L. R. 431 (borough councillor); *Re West Sussex County Council, Ex parte Henderson* (1895), 65 L. J. (Q. B.) 184 (county councillor); *R.* v. *Wilton Corporation* (1886), 34 W. R. 273 (alderman).

(*r*) *R.* v. *Ricketts* (1838), 3 Nev & P. (Q. B.) 151; *Re Barlow* (*Rector of Ewhurst*) (1861), 30 L. J. (Q. B.) 271. As to *quo warranto* proceedings, see p. 128, *post*; as to election petitions, see title ELECTIONS.

(*s*) *R.* v. *Chester Corporation* (1855), 25 L. J. (Q. B.) 61.

(*a*) *R.* v. *Cambridge Corporation* (1767), 4 Burr. 2008; *R.* v. *Bedford Corporation* (1800), 1 East, 79; *R.* v. *Pembroke Corporation* (1840), 8 Dowl. 302; *R.* v. *Government Stock Investment Co.* (1878), 3 Q. B. D. 442; *R.* v. *Stoke Damerel* (*Minister and Churchwardens*) (1836), 5 Ad. & El. 584; *R.* v. *Chester Corporation*, *supra*.

(*b*) *R.* v. *Truro Corporation* (1816), 2 Chit. 257. For *quo warranto* generally, see p. 128, *post*.

(*c*) Procedure by way of mandamus for obtaining the production and inspection of documents is only appropriate when there is no litigation pending, or when the documents in question are in the possession of persons who are not parties to the litigation. For the appropriate procedure when the documents are in the possession of parties to litigation, see R. S. C., Ord. 31 (discovery and inspection); and title DISCOVERY. As to the inspection, in particular, of the court rolls of a manor by a copyhold tenant, see R. S. C., Ord. 31, r. 19; and title COPYHOLDS, Vol. VIII., p. 16.

(*d*) 3 Bl. Com. 110.

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to deliver up the corporation's books on his removal (*e*), and to a late overseer to deliver up the parish books to his successor (*f*).

Inspection.

**167.** A mandamus will also lie to produce and permit the inspection of particular books or documents relating to a matter in controversy in which the party applying has an interest (*g*). So, the court will grant a mandamus to permit the inspection of particular entries in the court rolls of a manor (*h*); or in the books of a court leet (*i*); or in the records of a city company (*k*).

But a mandamus will not be granted commanding that general permission be given to inspect all the documents in the possession of any party or corporation. Accordingly, no mandamus will go allowing particular members of a body corporate to inspect all records, books, papers and muniments belonging to such body (*l*).

Applicant must have an interest.

**168.** The applicant's interest in the documents must be a direct and tangible interest. Curiosity, even though rational, or the ascertainment of facts which may be useful for furthering some ulterior object, does not constitute a sufficient interest to bring an applicant within the rule on which the court acts in granting a mandamus for the inspection of public documents (*m*).

Although reasonable grounds must be shown for requiring inspection (*n*), it is not necessary to show as a ground for the application for a mandamus to inspect documents that a suit has been actually instituted. It will suffice to show that there is some particular matter in dispute and that the applicant is interested therein (*o*); as where the applicant desires to inspect the rolls of a manor in order to make out his title as the necessary preliminary to the recovery of a rent-charge which is in arrear (*p*).

Statutory right to inspection.

**169.** In cases where there is a statutory provision that certain persons shall be allowed to inspect and take copies of particular documents it does not follow that the court will grant a mandamus for such inspection as a matter of course. The court will look at all the circumstances of the case and exercise its discretion whether or not

(*e*) *R.* v. *Wildman* (1730), 2 Stra. 879.

(*f*) *R.* v. *Clapham* (1751), 1 Wils. 305; *R.* v. *Fox* (1838), 1 Will. Woll. & H. 4.

(*g*) *R.* v. *Merchant Tailors' Co.* (1831), 2 B. & Ad. 115; *R.* v. *Staffordshire Justices* (1837), 6 Ad. & El. 84, *per* Lord DENMAN, C.J., at p. 99.

(*h*) *R.* v. *Shelley* (1789), 3 Term Rep. 141; *R.* v. *Lucas* (1808), 10 East, 235; *Ex parte Barnes* (1842), 2 Dowl. (N. S.) 20; *Rogers* v. *Jones* (1825), 5 Dow. & Ry. (K. B.) 484; *Folkard* v. *Hemet* (1776), 2 Wm. Bl. 1061.

(*i*) *R.* v. *Maidstone Corporation* (1825), 6 Dow. & Ry. (K. B.) 334.

(*k*) *Re Burton and the Saddlers' Co.* (1861), 31 L. J. (Q. B.) 62.

(*l*) *R.* v. *Merchant Tailors' Co., supra*; *R.* v. *Southwold Corporation, Ex parte Wrightson* (1907), 97 L. T. 431, *per* Lord ALVERSTONE, C.J.

(*m*) *R.* v. *Staffordshire Justices, supra*; compare *R.* v. *Southwold Corporation, supra*, where it was laid down that the mere fact that a councillor might make use of a document for purposes antagonistic to the policy of the local authority of which he was a member was not sufficient reason for refusing him a mandamus to inspect such document.

(*n*) *R.* v. *Maidstone Corporation, supra*; *Ex parte Cooke* (1848), 5 Dow. & L. 413.

(*o*) *R.* v. *Merchant Tailors' Co., supra, per* TAUNTON, J., at p. 129; *R.* v. *Lucas, supra.*

(*p*) *Ex parte Barnes, supra.*

the writ shall be granted. The applicant may, accordingly, be required to show that he has a reasonable object in asking for such inspection, and that he has a legitimate interest in the matter to which such inspection relates (*q*). The statutory provision that any shareholder of a company within the Companies Clauses Consolidation Act, 1845, shall be permitted to inspect the accounts of such company and to take copies and extracts therefrom at any reasonable time (*r*) does not entitle such a shareholder to a writ of mandamus, commanding that such inspection be permitted, unless he discloses an object which the court can regard as reasonable (*s*). And, although it is provided by statute that every parochial elector of a parish in a rural district may, at all reasonable times, without payment, inspect and take copies of and extracts from all books, accounts and documents, belonging to and under the control of the district council of the district (*t*), the court has refused a mandamus to allow a parochial elector to inspect and take copies of a case for the opinion of counsel upon a certain petition forwarded to that body, because no legitimate purpose would have been served by ordering such inspection (*a*).

(iv.) *The Enforcement of Statutory Rights and Duties.*

Enforcement of statutory duties.

**170.** A writ of mandamus will be granted ordering that to be done which a statute requires to be done (*b*), and for this rule to apply it is not necessary that the party or corporation on whom the statutory duty is imposed should be a public official or an official body. In order, however, for a writ of mandamus to issue for the enforcement of a statutory right, it must appear that the statute in question imposes a duty, the performance or non-performance of

(*q*) *R.* v. *London and St. Katharine Docks Co.* (*Directors*) (1874), 44 L. J. (Q. B.) 4; *R.* v. *Bradford-on-Avon Rural District Council, Ex parte Thornton* (1908), 99 L. T. 89; *R.* v. *Clear* (1825), 4 B. & C. 899; *R.* v. *Bank of England* (*Governor etc.*), [1891] 1 Q. B. 785.

(*r*) Companies Clauses Consolidation, Act 1845 (8 & 9 Vict. c. 16), s. 119; and see *Mutter* v. *Eastern and Midlands Rail. Co.* (1888), 38 Ch. D. 92, C. A., *per* LINDLEY, L.J., at pp. 105, 106.

(*s*) *R.* v. *London and St. Katharine Docks Co.* (*Directors*), *supra*, *per* BLACKBURN, J., at pp. 5, 6: "I do not mean to lay down an inflexible rule that when a party comes to claim a right he must show what object he has in view, but it may well be done in all cases where no reason appears why it should not be done. . . . A man ought in such a case as this to show that he is making a demand which is practicable and available, that his object is a legitimate one, and possesses for him an advantage proportionate to the disadvantage it brings to others." Compare *Davies* v. *Gas Light and Coke Co.*, [1909] 1 Ch. 708, C. A.

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58 (5).

(*a*) *R.* v. *Bradford-on-Avon Rural District Council, Ex parte Thornton*, *supra*, *per* Lord ALVERSTONE, C.J., at p. 90: "In my judgment we ought not on the evidence to exercise our powers, but I do not decide that in a proper case where it is shown that there is a legitimate interest as a parochial elector a man might not be entitled to see documents even though the local authority think they ought not to show them."

(*b*) "Mandamus is granted . . . for the execution of the common law or of a statute" (Com. Dig. tit. Mandamus, A); *Ex parte Robins* (1839), 7 Dowl. 566; *Ex parte Nash* (1850), 15 Q. B. 92, *per* Lord CAMPBELL, C.J., at p. 96: "I cannot give countenance to the practice of trying in this form questions whether an act professedly done in pursuance of a statute was really justified by the statute."

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which is not a matter of discretion. Accordingly, the court will refuse a mandamus directing a railway company to lay down and reinstate a certain piece of railway line when the company's Act only enables, and cannot be shown to contain anything to compel, them to maintain the line, so that there is no obligation or duty on the company to reinstate, that is to say, to maintain the line (*c*). The writ will issue to an official of a society to compel him to carry out the terms of the statute by which the society is controlled (*d*).

*Primâ facie* the words "it shall be lawful" occurring in a statute are permissive and enabling only, and will not therefore impose a duty in respect of which mandamus will lie (*e*).

A mandamus will also issue compelling the production of books and documents where there is provision for their production and inspection, either under a public general Act (*f*) or under a private Act (*g*); also to command the registration of stock in the books of a company (*h*).

Dock, railway etc. companies.

**171.** The writ will also issue commanding dock (*i*), railway (*k*), and similar companies to carry out the provisions of the Acts authorising their undertakings. Although a mandamus will lie to a railway company directing them to reinstate and lay down again a certain tram road or railway made by them under an Act of Parliament and afterwards taken up by them, no mandamus will issue ordering them to maintain a railway (*l*).

Compulsory purchase.

A writ of mandamus will issue to enforce certain rights arising under the Lands Clauses Consolidation Act, 1845 (*m*)—namely, when an award of compensation in respect of lands compulsorily acquired or injuriously affected has been made, to enforce the taking up of the award by the promoters (*n*); and to compel the promoters of an

(*c*) *R.* v. *Great Western Rail. Co.* (1893), 69 L. T. 572, C. A. Similarly, where an Act imported an authority, but not a command, to cut a canal to a certain place, a mandamus was refused to compel the company thus to complete their canal (*R.* v. *Birmingham Canal Navigation* (1770), 2 Wm. Bl. 708).

(*d*) As, for instance, to the Registrar of the Pharmaceutical Society to make a register of all members of the society according to the provisions of the Pharmacy Act, 1852 (15 & 16 Vict. c. 56); *R.* v. *Pharmaceutical Society* (1854), 2 W. R. 220.

(*e*) *Julius* v. *Oxford* (*Bishop*) (1880), 5 App. Cas. 214.

(*f*) See p. 82, *ante*.

(*g*) *R.* v. *St. Pancras Church Trustees* (1837), 6 Ad. & El. 314, where a mandamus was issued to trustees for building a new parish church to produce accounts in accordance with their statute.

(*h*) As, for instance, in the name of a married woman entitled to her separate use (*R.* v. *Carnatic Rail. Co.* (1873), L. R. 8 Q. B. 299).

(*i*) *R.* v. *Bristol Dock Co.* (1827), 6 B. & C. 181, where the mandamus commanded such alterations to certain sewers as were necessary.

(*k*) *R.* v. *Birmingham and Gloucester Rail. Co.* (1841), 2 Q. B. 51, n.; *R.* v. *Bristol and Exeter Rail. Co.* (1843), 4 Q. B. 162, where the mandamus was, in each case, to restore a certain turnpike road carried over a railway to its former width.

(*l*) *R.* v. *Severn and Wye Rail. Co.* (1819), 2 B. & Ald. 646. This case "does not prove that when a railway is once made it must be maintained for ever. It only proves that when a statute imposes on a company an obligation to maintain a railway which necessarily involves an obligation to reinstate, a mandamus will go to reinstate" (*R.* v. *Great Western Rail. Co.*, *supra*, *per* BOWEN, L.J., at p. 575).

(*m*) 8 & 9 Vict. c. 18.

(*n*) *R.* v. *South Devon Rail. Co.* (1850), 20 L. J. (Q. B.) 145; *R.* v. *London and*

undertaking, who have given notice of their intention to take lands compulsorily, to issue their warrant to the sheriff to summon a jury to assess compensation in respect thereof (*o*). A mandamus will similarly be granted wherever any Act of Parliament entitles a body to take lands compulsorily, and not only where the Lands Clauses Consolidation Act applies (*p*).

(v.) *Compelling Public Officials and Bodies to carry out their Duties.*

Compelling performance of public duties by Government officials.

**172.** If public officials or a public body fail to perform any public duty with which they have been charged, a writ of mandamus will lie to compel them to discharge it (*q*). In accordance with this principle a mandamus will issue to Government officials in their capacity as public officers exercising executive duties which affect the rights of private persons. Where, accordingly, the facts disclose

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*North Western Rail. Co.*, [1894] 2 Q. B. 512, where the case of *R.* v. *Lambourn Valley Rail. Co.* (1888), 22 Q. B. D. 463, which had been cited in support of the view that, even if at one time a writ of mandamus was the proper remedy under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), it had ceased to be so since a right to a mandamus in an action was given by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), was thus explained by WRIGHT, J., at p. 518: "Pollock, B., in the course of his judgment, appears to say that it is an answer to *any* application for a prerogative writ of mandamus if it is shown that a mandamus could have been granted for the same purpose in an action. I say, and I have said, with the assent of other judges at various times, that that would be unduly to narrow the powers of this court to grant a prerogative writ of mandamus . . . and we have no doubt that the practice which has been inveterate for years of enforcing the taking up of these awards under the Lands Clauses Act by a prerogative writ of mandamus is the proper remedy." See also *R.* v. *Cambrian Rail. Co.* (1869), L. R. 4 Q. B. 320, where the writ commanded the taking up of an award of compensation for an exclusive ferry injuriously affected.

"Mandamus lies to take up awards under the Lands Clauses Act only by virtue of s. 35 of that Act" (*R.* v. *London and North Western Rail. Co.*, *supra*, *per* WRIGHT, J., at p. 518). S. 35 provides that "the arbitrators shall deliver their award in writing to the promoters of the undertaking . . . " and, in the words of COLERIDGE, J., in *R.* v. *South Devon Rail. Co.* (1850), 20 L. J. (Q. B.) 145, "a direction to receive the award is a direction to take it up."

(*o*) *Re South Yorkshire, Doncaster and Goole Rail. Co. Ex parte Senior* (1849), 18 L. J. (Q. B.) 332; and see the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 23.

(*p*) *R.* v. *Hungerford Market Co.* (1832), 4 B. & Ad. 327; *Birch* v. *St. Marylebone Vestry* (1869), 20 L. T. 697, *per* BLACKBURN, J., at p. 701: "We have been in the habit for many years of holding that where notice to treat for the purchase of lands is given under the Lands Clauses Consolidation Act, there follows a legal obligation on the party giving the notice to issue their warrant. It has been so long the practice to treat that as law that I thought at first that the question as to granting a mandamus in the present case might turn upon the construction of some provision in that Act. But it is not so . . . the principle on which we have granted mandamuses is not the peculiar enactments of the Lands Clauses Consolidation Act, but this, that wherever by Act of Parliament a body is entitled to take lands compulsorily, there, as soon as they have made up their minds to do so, and give the other side notice of their intention, thereby hampering the land, and leaving it no longer free in the hands of the owner, they are bound to go on." See also title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 70, 91.

(*q*) *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A., *per* JAMES, L.J., at p. 115; *R.* v. *Income Tax Special Purposes Commissioners* (1888), 21 Q. B. D. 313, C. A., *per* Lord ESHER, M.R., at p. 317; *R.* v. *Stepney Corporation*, [1902] 1 K. B. 317, *per* Lord ALVERSTONE, C.J., at p. 321.

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Income tax.

a case in which, according to the statutory provisions relating to income tax, an allowance ought to be granted and certified by income tax commissioners, in the exercise of their executive duties, in order to enable recovery of overpaid income tax to be ultimately made, a mandamus will issue commanding those executive officers to make such allowance and grant a certificate thereof (*r*), and to issue an order for the repayment of such sum as has been overpaid (*s*).

Commissioners of Woods—Treasury.

Similarly, a mandamus will issue to the Commissioners of Woods and Forests (*t*) and to the Lords of the Treasury (*u*) in their capacity as public officers invested by statute with public duties affecting the rights of private persons.

Local Government Board.

The writ may also issue to the Local Government Board to assess and award compensation for loss of office in accordance with a public statute (*a*), to consider an application for a provisional order (*b*), and to hear and determine an appeal by a person aggrieved by an order of a municipal corporation under the provisions of a local Act giving such right of appeal (*c*); also to the Postmaster-General to assess compensation, in accordance with a

Postmaster-General.

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(*r*) *Income Tax Special Purposes Commissioners* v. *Pemsel*, [1891] A. C. 531 (allowance on lands etc. the rents of which are applied to charitable purposes, under the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 61).

(*s*) *R.* v. *Income Tax Special Purposes Commissioners* (1888), 21 Q. B. D. 313, C. A. (recovery of overpaid income tax after over-computation of profits, under the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 133). These cases must be distinguished from cases where it has been sought to enforce the payment of money by the Crown, as, for instance, in *Re Nathan* (1884), 12 Q. B. D. 461, C. A., where, in the words of Lord HERSCHELL in *Income Tax Special Purposes Commissioners* v. *Pemsel*, *supra*, at p. 569, "It was sought to compel the Commissioners of Inland Revenue to make payment of a certain sum of money to the applicant for the mandamus; and it was held that for such a purpose recourse must be had to a petition of right. Here the applicant seeks that the appellants should be compelled to grant an allowance and certificate, which it is necessary for him to obtain before he is in a position to require payment of the sum which it is no doubt his ultimate object to recover. Until he obtains this allowance and certificate he is not in a position to maintain a petition of right." Compare *R.* v. *Inland Revenue Commissioners, Ex parte Silvester*, [1907] 1 K. B. 108. As to a petition of right, see p. 26, *ante*.

(*t*) *R.* v. *Woods and Forests Commissioners, Re Budge* (1848), 17 L. J. (Q. B.) 341, where a rule for a mandamus was made absolute commanding the commissioners to issue their warrant to the sheriff for the purpose of summoning a jury to assess compensation under stat. 9 & 10 Vict. c. 38 (which statute empowered the commissioners to make a park) for land required by them; and compare *R.* v. *Woods and Forests Commissioners* (1850), 15 Q. B. 761.

(*u*) *R.* v. *Treasury* (*Lords*), *Queen Dowager's Annuity* (1851), 16 Q. B. 357, where mandamus was stated by the court to be the appropriate remedy when it was desired to compel the Lords of the Treasury to issue their warrant for the payment of arrears of an annuity granted under a statute and charged upon the Consolidated Fund; compare *Ex parte Walmsley* (1861), 1 B. & S. 81; *R.* v. *Treasury* (*Lords Commissioners*) (1909), 25 T. L. R. 450; and p. 93, *post*.

(*a*) *R.* v. *Local Government Board* (1874), L. R. 9 Q. B. 148, where the statutory provision in question was the Metropolitan Poor Act, 1867 (30 Vict. c. 6), s. 76.

(*b*) *R.* v. *Local Government Board* (1885), 15 Q. B. D. 70, C. A., where the application was for a provisional order under the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 16.

(*c*) *R* v. *Local Government Board, Ex parte Street* (1907), 96 L. T. 650, C. A.

public statute, on loss of office (*d*). The court would also, in a proper case, let the writ go to the Board of Trade (*e*).

Rating.

**173.** A mandamus will lie to enforce the levy of a rate to meet expenses incurred in the current rating year (*f*), and also, when reasonable ground can be shown for the delay, of a rate which is retrospective, that is to say, which is necessary for the purpose of discharging liabilities incurred in previous rating years (*g*).

Church rate.

**174.** A mandamus will lie calling upon churchwardens to hold a vestry meeting to consider whether it is proper to make a church rate, but no mandamus will be issued to make a church rate which is not authorised by statute (*h*). Where, however, a statute authorises the making of a church rate, a writ of mandamus will in general issue to enforce the provisions relating not only to assembling a vestry, but also to the levy of a rate for ecclesiastical purposes (*i*), whether or not there is concurrent ecclesiastical jurisdiction (*k*).

Distress for rates.

**175.** By the operation of the same principle that enables a court to grant a mandamus to make a rate, a mandamus has always lain to justices to issue a summons (*l*) or distress warrant (*m*) for

(*d*) *R.* v. *Postmaster-General* (1878), 3 Q. B. D. 428, C. A., where the mandamus went ordering compensation to be assessed on certain emoluments which the Postmaster-General had sought to exclude from the calculation; compare *R.* v. *Postmaster-General* (1873), 28 L. T. 337; *R.* v. *Postmaster-General* (1885), 1 T. L. R. 551.

(*e*) *Cowes and Newport Rail. Co.* v. *Board of Trade* (1874), 43 L. J. (Q. B.) 242.

(*f*) *R.* v. *Ledgard* (1841), 1 Q. B. 616; *R.* v. *Norfolk Commissioners of Sewers* (1850), 20 L. J. (Q. B.) 121; *R.* v. *St. George the Martyr, Southwark, Vestry* (1892), 61 L. J. (Q. B.) 398. As to mandamus to levy a rate under a local Act, see *Gallsworthy* v. *Selby Dam Drainage Commissioners*, [1892] 1 Q. B. 348, C. A.

(*g*) *R.* v. *Leigh Rural Council*, [1898] 1 Q. B. 836, C. A., where a rule for a mandamus applied for in October, 1897, was made absolute commanding the issue of a precept for the levy of a rate to pay the amount of a judgment recovered in May, 1897, on account of a debt incurred in 1895, the court following *Worthington* v. *Hulton* (1865), L. R. 1 Q. B. 63, the result of which case, according to A. L. SMITH, L.J., at p. 844, "is to show that the court came to the conclusion that there was no hard and fast rule . . . to the effect that the court would not grant the mandamus to make a rate unless moved for within the rating year in which the expenses were incurred, but that they might grant it where there was a sufficient excuse for the delay in commencing the action"; *Croydon Corporation* v. *Croydon Rural Council*, [1908] 2 Ch. 321, C. A., where the court, however, refused a mandamus on account of a liability incurred in 1904 and left unprovided for because, by a common mistake, the creditors did not demand and the local authority did not pay the full amount due in the current rating year; see also *R.* v. *Maidenhead Corporation* (1882), 9 Q. B. D. 494, C. A. (repayment by borough of amount due to Treasury). See, generally, title RATES AND RATING.

(*h*) *R.* v. *St. Margaret's, Westminster* (*Churchwardens*) (1815), 4 M. & S. 250; *R.* v. *Wilson* (1825), 5 Dow. & Ry. (K. B.) 602; *R.* v. *St. Peter's, Thetford* (*Churchwardens*) (1793), 5 Term Rep. 364. As to church rates, see generally title ECCLESIASTICAL LAW.

(*i*) *R.* v. *St. Mary, Lambeth* (*Churchwardens*) (1832), 3 B. & Ad. 651; *R.* v. *St. Saviour's, Southwark* (*Churchwardens*) (1838), 7 Ad. & El. 925; *R.* v. *St. Matthew's, Bethnal Green, Vestry* (1885), 53 L. T. 634, H. L.

(*k*) *R.* v. *St. Margaret's, Leicester* (*Select Vestrymen*) (1838), 8 Ad. & El. 889, *per* Lord DENMAN, C.J., at p. 899.

(*l*) *Anon.* (1815), 2 Chit. 257; *R.* v. *Benn* (1795), 6 Term Rep. 198.

(*m*) *St. Luke's Parish* v. *Middlesex Justices* (1746), 1 Wils. 133; *R.* v. *Cheek* (1847), 11 Jur. 86, n.

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levying unpaid rates. A statutory order in the nature of a mandamus to the justices will now be granted commanding them to perform this ministerial act (*n*). Justices will be ordered to do the ministerial act of allowing a poor rate (*o*) in the same way (*p*). The court will, however, refuse to issue a mandamus to compel magistrates to grant a warrant of commitment or distress for the purpose of enforcing a conviction (*q*).

Revising barrister.

**176.** A mandamus will lie to a revising barrister to revise lists of electors, and to hear and determine claims for inclusion therein (*r*), and to carry out alterations made necessary by errors in the burgess roll (*a*).

Under Public Health Acts.

**177.** Where a person seeks compensation in accordance with the provision that, where any person sustains damage by reason of the exercise of the powers of the Public Health Acts, full compensation shall be made to such person by the local authority exercising such powers (*b*), and such person is met by a denial of liability by the local authority concerned, a mandamus will issue commanding such local authority to cause compensation to be made; and it is no objection to the issue of the mandamus that no specific sum had been claimed or that no steps had been taken to settle the amount by arbitration in accordance with the Act (*c*).

Other duties.

**178.** Other public duties the performance of which may be compelled by mandamus are: the deposit of public books and documents as directed by a statute (*d*); to a master of the Supreme Court to tax the costs of an inquiry to assess the purchase-money and compensation in proceedings under the Lands Clauses Consolidation Act, 1845 (*e*); to a returning officer to countermand the notice of poll for the election of county councillors in accordance with the Ballot Act, 1872 (*f*); to the treasurer of a borough to pay the expenses of a prosecution in accordance with an order made by the judge of assize (*g*); to the Lord Mayor of London to take the

(*n*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 5; *R.* v. *Marsham* (1883), 50 L. T. 142, C. A.; see p. 106, *post*.

(*o*) See Poor Relief Act, 1601 (43 Eliz. c. 2).

(*p*) *R.* v. *Godolphin* (*Lord*) (1844), 13 L. J. (M. C.) 57.

(*q*) *Ex parte Thomas* (1847), 16 L. J. (M. C.) 57.

(*r*) *R.* v. *Nash*, [1900] 1 Q. B. 103. There is special statutory provision for an order in the nature of a mandamus to a revising barrister to state a case; see p. 109, *post*.

(*a*) *Re Eastbourne Town Clerk, Ex parte Keay* (1891), 66 L. T. 323, *per* WRIGHT, J., at p. 324 See also p. 109, *post*; and title ELECTIONS.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308, which section re-enacts s. 144 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), now repealed, which was in question in the case.

(*c*) *R.* v. *Burslem Local Board of Health* (1860), 29 L. J. (Q. B.) 242, Ex. Ch.

(*d*) *R.* v. *Payn* (1837), 6 Ad. & El. 392, *per* COLERIDGE, J., at p. 402 (mandamus to compel county treasurer to deposit a book of accounts with the clerk of the peace).

(*e*) 8 & 9 Vict. c. 18; *Re Westfield and Metropolitan Rail. Cos.*, *R.* v. *Smith* (1883), 12 Q. B. D. 481.

(*f*) 35 & 36 Vict. c. 33, s. 1; *R.* v. *Stewart*, [1898] 1 Q. B. 552.

(*g*) *R.* v. *Oswestry* (*Treasurer*) (1848), 12 Q. B. 239, decided upon Criminal Law Act, 1826 (7 Geo. 4, c. 64); compare *R.* v. *Clark* (1844), 5 Q. B. 887; *R.* v. *Hayward* (1848), 17 L. J. (Q. B.) 223.

recognisances of a prosecutor to prosecute by way of indictment in accordance with the Vexatious Indictments Act, 1859 (*h*); to a board of guardians to obey an order of the Local Government Board under the Public Health Act, 1875 (*i*); and to a local education authority to obey an order of the Board of Education made under the provisions of the Education Act, 1902 (*k*).

(vi.) *Commanding Inferior Tribunals to exercise their Jurisdiction.*

Inferior tribunals.

**179.** The writ of mandamus will issue to tribunals exercising an inferior jurisdiction, commanding them to adjudicate according to their powers in matters which are judicial in their character (*l*).

County courts.

**180.** The writ will accordingly issue commanding a county court judge to hear and determine a dispute concerning a matter not within his ordinary jurisdiction, but which is specially referred to him by statute (*m*). Where formerly a writ of mandamus would have issued to a county court judge to hear and determine a case within his ordinary jurisdiction (*n*), an order in the nature of a mandamus will issue to the same end (*o*).

Quarter sessions.

**181.** The writ will lie to courts of quarter sessions to hear and determine an appeal in which they have declined jurisdiction (*p*). They will be considered to have declined jurisdiction when they have wrongly allowed a preliminary objection on a point of law or practice and consequently refused to hear the case upon the merits (*q*), as when they have acted upon a supposed rule which is no rule (*r*), or under the mistaken belief that there was no jurisdiction, erroneously thinking, for example, that they were precluded

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(*h*) 22 & 23 Vict. c. 17; *R.* v. *London Corporation, Ex parte Gostling* (1886) 54 L. T. 646.

(*i*) 38 & 39 Vict. c. 55, s. 299; *R.* v. *Staines Union* (1893), 62 L. J. (Q. B.) 540.

(*k*) 2 Edw. 7, c. 42, s. 16; *A.-G.* v. *West Riding of Yorkshire County Council*, [1907] A. C. 29.

(*l*) 3 Bl. Com. 110; *R.* v. *Kingston Justices, Ex parte Davey* (1902), 86 L. T. 589, *per* Lord ALVERSTONE, C.J., at p. 590.

(*m*) *Re Brighton Sewers Act* (1882), 9 Q. B. D. 723, where under the provisions of a local Act relating to the disposal of sewage it was enacted that any dispute arising between the sewers board and any local authority with respect to carrying into effect the provisions of the Act might, at the instance of either party, be referred to the county court judge, who should hear and determine the dispute.

(*n*) *R.* v. *Richards* (1851), 20 L. J. (Q. B.) 351; *R.* v. *Harden* (1854), 23 L. J. (Q. B.) 127.

(*o*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 131; *R.* v. *Southampton County Court Judge and Fisher & Son, Ltd.* (1891), 65 L. T. 320; and see p. 107, *post*, and title COUNTY COURTS, Vol. VIII., p. 614.

(*p*) *R.* v. *Monmouthshire Justices* (1825), 4 B. & C. 844, 849; *R.* v. *Oxfordshire Justices* (1843), 4 Q. B. 177; *R.* v. *Denbighshire Justices* (1841), 9 Dowl. 509; see title MAGISTRATES.

(*q*) *R.* v. *Kesteven Justices* (1844), 3 Q. B. 810, where it was held that the question of the sufficiency of the statement of the grounds of appeal against an order of removal was a question of fact and therefore a case for sessions to decide; overruling *R.* v. *Carnarvonshire Justices* (1841), 2 Q. B. 325; and *R.* v. *West Riding Justices* (1841), 2 Q. B. 331.

(*r*) *R.* v. *Kesteven Justices, supra, per* Lord DENMAN, C.J., at p. 819.

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from deciding what were the "next practicable sessions" (*s*); also when, having heard one side, they have refused to hear the other (*t*).

Although courts of quarter sessions have discretion to make rules governing their practice, the High Court will interfere to control that discretion, and will issue a mandamus to hear an appeal which has been dismissed for non-compliance with a rule laid down by the justices, when justice demands it (*a*); or where a rule of sessions is not in accordance with statutory provisions (*b*), or is *ultra vires* (*c*).

Where sessions have made a false entry in their records, as where it is an entry which they had no power to make, mandamus will lie to compel its erasure (*d*).

No mandamus will be issued to a court of quarter sessions to grant a special case; but, if the case has been granted, a mandamus may, in special circumstances, be issued, ordering that the case be stated (*e*).

Magistrates.

**182.** Similarly a mandamus will lie to magistrates who decline to adjudicate in matters within their province (*f*). They will be considered to have declined jurisdiction when they have dismissed an information on a point relating to their jurisdiction only, such as that it was necessary to bring all joint-owners before them instead of simply the one against whom the information had been laid (*g*); also when they have refused to issue summonses in consequence of having acted upon considerations which were extraneous

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(*s*) *R.* v. *Derbyshire Justices* (1871), 25 L. T. 161 (appeal against order of removal).

(*t*) *R.* v. *Carnarvon Justices* (1820), 4 B. & Ald. 86, *per* HOLROYD, J., at p. 88.

(*a*) *R.* v. *Lancashire Justices* (1828), 7 B. & C. 691, where the rule in question was as to the period of notice of appeal against an order of removal; *R.* v. *Wiltshire Justices* (1808), 10 East, 404, where the appellants had been precluded by sessions from having their appeal against an order of removal heard because they had not conformed to a new rule as to notice, of which they were ignorant; *R.* v. *Wilts Justices* (1828), 8 B. & C. 380, where the appellants had relied upon the practice of the court of quarter sessions as to the adjournment of appeals, and the justices, departing from that practice, had refused to hear the appellant on the ground that the case ought to have been heard at the previous sessions; *Ex parte Becke* (1832), 3 B. & Ad. 704, *per* Lord TENTERDEN, C.J., at p. 705.

(*b*) *R.* v. *West Riding of Yorkshire Justices* (1833), 4 B. & Ad. 685.

(*c*) *R.* v. *Bird, Ex parte Needes*, [1898] 2 Q. B. 340; *R.* v. *Staffordshire Justices* (1836), 4 Ad. & El. 842.

(*d*) *R.* v. *West Riding of Yorkshire Justices* (1843), 12 L. J. (M. C.) 148; compare *Ex parte Ackworth Overseers* (1843), 13 L. J. (M. C.) 38.

(*e*) *Ex parte Jarvin (Inhabitants)* (1840), 9 Dowl. 120; compare *R.* v. *Pembrokeshire Justices* (1831), 2 B. & Ad. 391, where a mandamus to state a case was refused because it would in the circumstances have been futile to grant it; and see title MAGISTRATES.

(*f*) *R.* v. *Brown* (1857), 26 L. J. (M. C.) 183, *per* COLERIDGE, J., at p. 184: "This may perhaps be a test: if the objection be such, that whatever the merits of the case, whether the defendant be guilty or not guilty, the justices hold that they cannot decide on the merits owing to the objection, for instance, either of want of parties or of notice, such holding is a declining of jurisdiction and not an adjudication"; and see title MAGISTRATES.

(*g*) *Ibid.*

and extra-judicial and which they ought not to have taken into account (*h*); also when they have rejected evidence which was tendered to them, which rejection amounted to a refusal to enter upon an inquiry imposed upon them by statute (*i*). There is now an alternative remedy by way of a statutory order in the nature of a mandamus which may be directed to justices in respect of the duties of their office (*k*).

Licensing justices.

**183.** Upon the same principle a mandamus will go to licensing justices who have failed to hear and determine according to law an application in respect of a licence, commanding them to hear and determine an application for the grant (*l*), renewal (*m*), or transfer (*n*) of a licence; but no mandamus will go commanding the actual grant, renewal, or transfer (*o*). Licensing justices will be held to have decided otherwise than according to law when they have disregarded the provisions of the statute giving them jurisdiction (*p*).

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(*h*) *R.* v. *Adamson* (1875), 1 Q. B. D. 201, where the application for a mandamus arose out of the refusal of magistrates to grant summonses against certain persons to answer a charge of conspiracy to break the peace and do grievous bodily harm to certain persons at a public meeting, and COCKBURN, C.J., in making the rule absolute, said (at p. 205) that probably the magistrates "were influenced by their distaste for the views and doctrines promulgated at the meeting, and thought that the sooner the matter was buried in oblivion the better. But these were considerations which ought not to have influenced them at all, and under the circumstances I think they must be taken to have declined jurisdiction"; *R.* v. *Evans* (1890), 62 L. T. 570, where the magistrate adjourned a summons for a long period in view of the fact that civil proceedings arising out of the same matter were pending between other parties; *R.* v. *Bennet, Ex parte Bennet* (1908), 72 J. P. 362, where the circumstance improperly taken into consideration was the prosecutor's previous conduct; *R.* v. *Byrde* (1890), 63 L. T. 645, where the ground on which the justices refused the summons was that a summons for an offence of the same nature, taken out by the same prosecutor eleven years before, had been dismissed on the ground that the offence alleged had been completed more than six months before the date of the summons and that there was therefore no jurisdiction to go again into the matter, the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, imposing such a limitation as to the time within which a complaint is to be made or such information laid.

(*i*) *R.* v. *Marsham*, [1892] 1 Q. B. 371, C. A., where the magistrate had declined to determine a matter arising under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), as amended by the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), namely, whether certain expenses were paving expenses, and whether they were actually incurred (ss. 225, 226 of the Act of 1855). It was pointed out by Lord ESHER, M.R., at p. 378, that "the magistrate does not say that the evidence tendered would not prove the fact that the claim of the board included matters outside the statute; he has refused to hear the evidence, even though it would prove that fact; he has, therefore, declined jurisdiction."

(*k*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 5; see p. 106, *post*.

(*l*) *R.* v. *Bowman*, [1898] 1 Q. B. 663, where the justices had attached an illegal condition to the grant of the licence. See, generally, title INTOXICATING LIQUORS.

(*m*) *R.* v. *Kingston Justices, Ex parte Davey* (1902), 86 L. T. 589.

(*n*) *R.* v. *Cotham*, [1898] 1 Q. B. 802.

(*o*) *R.* v. *Kingston Justices, Ex parte Davey, supra*.

(*p*) *R.* v. *Sykes* (1875), 1 Q. B. D. 52; followed in *Ex parte Smith* (1878), 3 Q. B. D. 374, and *R.* v. *Thomas*, [1892] 1 Q. B. 426, in which cases the justices

SECT. 4. Mandamus.

In ecclesiastical matters.

Parliamentary elections.

**184.** The writ will also lie to a metropolitan to hear objectors to the confirmation of a bishop-elect if the objections are such as ought to be heard (*q*); and to a bishop to issue a commission for an inquiry into a charge against a clergyman under the Church Discipline Act, 1840 (*r*), or in the alternative to send the case by letters of request to the Court of Arches (*s*); also to election commissioners appointed under the provisions of the Election Commissioners Act, 1852 (*t*), to inquire as to corrupt practices at a parliamentary election, commanding them to grant to a witness a certificate of indemnity (*a*), when such commissioners have found the facts to exist which entitle the witness to the certificate (*b*).

SUB-SECT. 3.—*Offices and Duties in respect of which, although of a Public Nature, Mandamus will not lie.*

(i.) *The Crown.*

Mandamus against the Crown.

**185.** As no court can compel the Sovereign to perform any duty, no writ of mandamus will lie to the Crown (*c*). Where it is sought to establish a right against the Crown the appropriate procedure is by way of petition of right (*d*).

Secretary of State.

Nor will the writ lie against a Secretary of State in his capacity as an agent for the Crown; for in that capacity he is responsible to the Crown alone, and is under no legal duty towards a subject (*e*). He is acting in such a capacity when carrying out the provisions of a royal warrant (*f*).

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had not stated the grounds for their decision contrary to a statutory provision; *R.* v. *Scott* (1889), 22 Q. B. D. 481, where the justices had claimed an absolute discretion to refuse a licence where, in fact, restrictions upon such discretion were imposed by statute; *R.* v. *Cotham*, [1898] 1 Q. B. 802, where "the justices so far departed from the plain words of the Act—deciding upon some extraneous consideration—that they could not be said to have heard and determined according to law" (*ibid.*, *per* WILLS, J., at p. 807); *R.* v. *Dodds*, [1905] 2 K. B. 40, C. A., where what the justices did was "to decide in favour of a renewal with a condition which they had no power to impose and which is therefore nugatory," so that a mandamus had to go "to compel them to deliver the renewal licences without the condition" (*ibid.*, *per* COLLINS, M.R., at p. 52).

(*q*) *R.* v. *Canterbury* (*Archbishop*) (1848), 11 Q. B. 483.

(*r*) 3 & 4 Vict. c. 86, s. 3.

(*s*) *R.* v. *Oxford* (*Bishop*) (1879), 4 Q. B. D. 245; and see title ECCLESIASTICAL LAW.

(*t*) 15 & 16 Vict. c. 57.

(*a*) See Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 59, in substance re-enacting s. 7 of the Corrupt Practices Prevention Act, 1863 (26 & 27 Vict. c. 29); *R.* v. *Price* (1871), L. R. 6 Q. B. 411.

(*b*) *R.* v. *Holl* (1881), 7 Q. B. D. 575, C. A., *per* BRETT, L.J., at p. 585; and *per* COTTON, L.J., at p. 588. But it is perhaps open to doubt whether mandamus lies to a commissioner appointed to try a local government election petition; see *Re Pembroke Election Petition*, [1908] 2 I. R. 433. See also title ELECTIONS.

(*c*) *R.* v. *Powell* (1841), 1 Q. B. 352, *per* Lord DENMAN, C.J., at p. 361: "That there can be no mandamus to the Sovereign, there can be no doubt, both because there would be an incongruity in the Queen commanding herself to do an act, and also because disobedience to the writ of mandamus is to be enforced by attachment"; see also *R.* v. *Treasury* (*Lords Commissioners*) (1872), L. R. 7 Q. B. 387, *per* COCKBURN, C.J., at p. 394.

(*d*) *Re de Bode* (*Baron*) (1838), 6 Dowl. 776, 793, n.; and see *Re Nathan* (1884), 12 Q. B. D. 461, C. A. As to petition of right, see p. 26, *ante*.

(*e*) *R.* v. *Secretary of State for War*, [1891] 2 Q. B. 326, C. A.

(*f*) *Ibid.*

Crown servants.

In like manner all other persons acting as servants of the Crown are exempt from the prerogative jurisdiction of the court, and no writ of mandamus can accordingly issue against them to do any act within the scope of the duties discharged by them on behalf of the Crown (*g*).

Where, however, Government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards such subjects, a writ of mandamus will lie for the enforcement of such duties (*h*).

(ii.) *The Superior Courts.*

Superior courts.

**186.** The writ of mandamus will not issue to any of the superior courts (*i*). Accordingly, no mandamus will go to the House of Lords, the Court of Appeal, or any of the Divisions which make up the High Court of Justice (*k*). A Court of Assize is a superior court (*l*); and also the Central Criminal Court, whether its jurisdiction

(*g*) *R.* v. *Customs Commissioners* (1836), 5 Ad. & El. 380, where it was sought to obtain a mandamus commanding the delivery up of certain tobacco; but "the goods are in the hands of the officers of the Crown: a mandamus to them in this case would be like a mandamus to the Crown, which we cannot grant" (*ibid.*, *per* LITTLEDALE, J., at p. 382); see also *R.* v. *Lindsay and Customs Board* (1888), 4 T. L. R. 464, where Lord COLERIDGE, C.J., said (at p. 465): "It was a very serious question whether a mandamus could be issued to the Board of Customs"; *Ex parte Reeve* (1837), 5 Dowl. 668, where a rule for a mandamus to compel the Woods and Forests Commissioners to pay a certain poor rate was refused, as they held the lands in question on behalf of the King; *Re de Bode* (*Baron*) (1838), 6 Dowl. 776, where a rule for a mandamus to the Lords of the Treasury to pay over certain money was refused, it being held by the court that the money was held by the Lords of the Treasury as "the mere servants of the Crown," and "against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a mandamus will not lie" (*ibid.*, *per* COLERIDGE, J., at p. 792); *R.* v. *Treasury* (*Lords Commissioners*) (1872), L. R. 7 Q. B. 387, where it was held that money voted as a supply to the Crown, appropriated to a specific purpose by the Appropriation Act, and paid to the Treasury under warrants or orders under the sign-manual, was paid to the latter as servants of the Crown, and that no mandamus would lie to them to pay over such money to a particular person; see *contrà*, *R.* v. *Treasury* (*Lords Commissioners*) (1835), 4 Ad. & El. 286, which was referred to in *R.* v. *Treasury* (*Lords Commissioners*), *supra*, *per* COCKBURN, C.J., at p. 395, as "a case of very doubtful authority," and was expressly disapproved of in *Re Nathan* (1884), 12 Q. B. D. 461, C. A. Compare *R.* v. *Treasury* (*Lords Commissioners*) (1909), 25 T. L. R. 450, *per* Lord ALVERSTONE, C.J., at p. 451: "As to the point raised as to a mandamus not lying against the Treasury, a mandamus calling upon the Treasury to pay would not lie; but where an Act thought that a public authority was the proper body to decide a particular question, a mandamus would lie to start the machinery by which alone the question could be decided"; see also p. 85, *ante*.

(*h*) *R.* v. *Secretary of State for War*, [1891] 2 Q. B. 326, C. A.; *R.* v. *Treasury* (*Lords Commissioners*) (1872), L. R. 7 Q. B. 387, *per* LUSH, J., at p. 402; *Re Nathan* (1884), 12 Q. B. D. 461, C. A., *per* DAY, J., at p. 464; and see p. 86, *ante*; compare *R.* v. *Land Registry Vice-Registrar* (1889), 24 Q. B. D. 178; *R.* v. *Friendly Societies Registrar* (1872), L. R. 7 Q. B. 741; and see, generally, title CONSTITUTIONAL LAW, Vol. VI., pp. 412 *et seq.*

(*i*) *The Rioters' Case* (1683), 1 Vern. 175; *R.* v. *Oxenden* (1691), 1 Show. 218.

(*k*) Bac. Abr. tit. Courts, D.

(*l*) *Ex parte Fernandez* (1861), 10 C. B. (N. S.) 3, *per* WILLES, J., at p. 49. As to superior and inferior courts, see title COURTS, Vol. IX., p. 11.

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is exercised by His Majesty's judges or the Recorder and Commissioners as justices of sessions (*m*), and these also, accordingly, are courts to which the writ will not go.

Privy Council.

Apparently, also, the court will refuse to issue a writ of mandamus to the Privy Council (*n*).

Convocation.

Neither will the writ issue for the purpose of interfering with the internal affairs of Convocation (*o*).

(iii.) *Inferior or Ministerial Officers.*

Inferior or ministerial officers.

**187.** The writ of mandamus will not be granted against one who is an inferior or ministerial officer, bound to obey the orders of a competent authority, to compel him to do something which is part of his duty in that capacity (*p*). The writ will accordingly be refused when it is sought thereby to compel a county treasurer to obey an order of quarter sessions (*q*); also when it is sought to compel a borough treasurer to pay the costs of a prosecution in obedience to the order of a judge of assize (*r*) or a court of quarter sessions (*s*).

But where it is not clear that the matter complained of is one in respect of which a ministerial officer is subject to the orders of a competent authority this rule will not apply (*a*); nor will the rule

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(*m*) *R.* v. *Central Criminal Court Justices* (1883), 11 Q. B. D. 479.

(*n*) *Ex parte Smyth* (1835), 3 Ad. & El. 719, where the real object of the motion was to compel the rehearing of an appeal by the Judicial Committee of the Privy Council, and it was said with reference to that point (*per* PATTESON, J., at p. 722): "I never heard that we could compel any court to rehear a case already decided." It was said by LITTLEDALE, J., however (*ibid.*, at p. 722), that although the Court of Delegates, which was superseded by the Judicial Committee, might have granted a commission of review, "I have no notion that this court can now accomplish the object of such a commission by a mandamus." As to the Judicial Committee, see title COURTS, Vol. IX., pp. 27 *et seq.*

(*o*) *R.* v. *York* (*Archbishop*) (1888), 20 Q. B. D. 740, where a mandamus to the archbishop, as president of Convocation, directing him to admit a certain proctor into Convocation, was refused. "What we are asked to do is to interfere in the internal affairs of an ancient body as old as Parliament and as independent. . . . Such an interference would not only be without a shadow of precedent, but would be inconsistent with the character and constitution of the body with which we are asked to interfere" (*ibid.*, *per* Lord COLERIDGE, C.J., at p. 748). As to Convocation, see title ECCLESIASTICAL LAW.

(*p*) *R.* v. *Bristow* (1795), 6 Term Rep. 168; *R.* v. *Jeyes* (1835), 3 Ad. & El. 416.

(*q*) *R.* v. *Shaw* (1794), 5 Term Rep. 549; *R.* v. *Bristow*, *supra*, where Lord KENYON, C.J., at p. 170, laid it down that: "This court has no difficulty upon a proper case laid before them in granting a mandamus to justices to make an order when they refuse to do their duty. But it would be descending too low to grant a mandamus to inferior officers to obey that order."

(*r*) *R.* v. *Jeyes*, *supra*, where "the defendant was the servant of the magistrates, and the court refused to place itself in the situation of the magistrates to make their officer perform his duty" (*R.* v. *Payn* (1837), 6 Ad. & El. 392, *per* Lord DENMAN, C.J., at p. 400).

(*s*) *R.* v. *Surrey County Treasurer* (1819), 1 Chit. 650.

(*a*) *R.* v. *Payn*, *supra*, *per* COLERIDGE, J., at p. 401: "The result of the cases cited appears to be merely this: that where we find a public officer who has received an order from his masters or any competent authority, and who, upon disobeying that order will be liable to indictment, we do not proceed by mandamus. The court leaves the case to the ordinary remedies, not because

apply where the affidavits furnish evidence that a ministerial officer is only put forward as a nominal party by others who are the persons really interested in preventing the issue of the mandamus (*b*).

(iv.) *Where Discretion has been given and exercised.*

The extent of the writ.

**188.** In cases where application is made for the issue of a writ of mandamus to tribunals of a judicial character, the writ will only be allowed to go commanding such tribunals to hear and decide a particular matter. No writ will be issued dictating to them in what manner they are to decide (*c*).

Where, accordingly, a county court judge (*d*), or a court of quarter sessions (*e*), or magistrates (*f*), or the Railway and Canal Commissioners (*g*), or election commissioners appointed under the Election Commissioners Act, 1852 (*h*), to inquire as to corrupt practices at parliamentary elections (*i*) have in fact heard and determined any matter within their jurisdiction, no mandamus will issue for the purpose of reviewing their decision. The rule holds good even though such decision is erroneous (*k*), not only as to facts, but also in point of law (*l*); and although the particular circumstances of the case are such that there is only one way of performing the duty in question (*m*).

Discretion of justices.

**189.** The court will refuse to interfere by mandamus with the decision of justices when the ground of their decision was that they

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the party is too low, but because he has received an order from competent authority. Here the magistrates have issued no order, and this distinguishes the case from *R.* v. *Bristow* (1795), 6 Term Rep. 168, and *R.* v. *Jeyes* (1835), 3 Ad. & El. 416, in one of which there was an order by the magistrates and in the other by the judge of assize."

(*b*) *Ex parte Bottom* (1849), 13 Jur. 680; *R.* v. *Wood Ditton Highway Surveyors* (1849), 18 L. J. (M. C.) 218, *per* PATTESON, J., at p. 219: "We cannot fail to see that these surveyors are so mixed up in interest with the railway company, and that it is, in fact, the company, and not the surveyors as mere ministerial officers, who are disputing the liability, that the ordinary rule should not prevail, and a mandamus ought to go."

(*c*) *Re Dyson, Ex parte Cook* (1860), 29 L. J. (Q. B.) 68, *per* COCKBURN, C.J., at p. 69; *R.* v. *Dayman* (1857), 26 L. J. (M. C.) 128, *per* CROMPTON, J., at p. 132; *R.* v. *Goodrich* (1850), 19 L. J. (Q. B.) 413.

(*d*) *Kernot* v. *Bailey* (1856), 4 W. R. 608; *Re Milner* v. *Rhoden, Ex parte Milner* (1851), 15 Jur. 1037, where the judge had nonsuited the plaintiff because he was of opinion that the matter in question could only be dealt with by a court of equity, and that, therefore, he had no power to adjudicate.

(*e*) *R.* v. *Goodrich, supra, per* Lord CAMPBELL, C.J., at p. 415; *Ex parte Ackworth Overseers* (1843), 13 L. J. (M. C.) 38.

(*f*) *R.* v. *Adamson* (1875), 1 Q. B. D. 201, *per* COCKBURN, C.J., at p. 205; *R.* v. *Kennedy* (1902), 86 L. T. 753, *per* Lord ALVERSTONE, C.J., at p. 755; *Ex parte Reid* (1885), 49 J. P. 600.

(*g*) *Rhymney Iron Co., Ltd.* v. *Rhymney Rail. Co.* (1888), 6 Ry. & Can. Tr. Cas. 60, C. A.

(*h*) 15 & 16 Vict. c. 57.

(*i*) *R.* v. *Holl* (1881), 7 Q. B. D. 575, C. A.

(*k*) *R.* v. *Evans* (1890), 62 L. T. 570, *per* COLERIDGE, J., at p. 571; *Ex parte Macmahon* (1883), 48 J. P. 70; *R.* v. *Monmouthshire Justices* (1825), 4 B. & C. 844; *R.* v. *Middlesex Justices* (1877), 2 Q. B. D. 516; *Ex parte Ackworth Overseers, supra.*

(*l*) *R.* v. *Bird, Ex parte Jones* (1898), 62 J. P. 309; *Re Milner* v. *Rhoden, Ex parte Milner, supra.*

(*m*) *R.* v. *Kingston Justices, Ex parte Davey* (1902), 86 L. T. 589.

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disbelieved certain evidence (*n*); also when the ground of the application is that the justices, believing a witness to be incompetent, refused to receive his evidence (*o*); and also when the question is whether or not a matter shall be adjourned (*p*)—for all these are matters for the decision of the justices in the exercise of their discretion; also with a refusal to grant a summons on the ground that the information did not disclose an indictable offence (*q*).

Whether a judgment or verdict is properly or improperly entered on the record is a matter for the court at which the hearing took place (*r*); and accordingly no mandamus will be issued when the circumstances of the application are such that the court is invited to go behind a court of quarter sessions record (*a*). Nor will a court of quarter sessions be ordered by mandamus to supplement their records by making a special entry setting forth the reasons for their judgment (*b*).

No mandamus will issue to the justices in quarter sessions dictating to them the judgment they should give upon an application to quash a rate, for quashing a rate is a judicial act (*c*).

It has been held that magistrates acted within the bounds of their discretion when they refused an application for a summons because they were of opinion that another form of procedure was more appropriate to the case, and that the statute invoked by the applicant was practically obsolete (*d*); also when they refused to hear the whole of the evidence tendered upon an information because they concluded that a suit which was pending might be prejudiced by proceeding upon the information (*e*).

Preliminary objections.

**190.** If an inferior tribunal decides a question of fact upon a preliminary objection, and in consequence dismisses a matter brought before it, no mandamus will lie commanding that tribunal to hear and determine the matter (*f*).

Ecclesiastical matters.

**191.** When representations have been made to a bishop, under the provisions of the Public Worship Regulation Act, 1874, that there have been unlawful alterations or additions to the fabric, ornaments or furniture of a church, his decision on the question

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(*n*) *R.* v. *Bowman*, [1898] 1 Q. B. 663, *per* DARLING, J., at p. 668; *R.* v. *Goodrich* (1850), 19 L. J. (Q. B.) 413, *per* Lord CAMPBELL, C.J., at p. 416.

(*o*) *R.* v. *Yorkshire Justices, Ex parte Gill* (1885), 53 L. T. 728; *R.* v. *Cambridgeshire Justices* (1822), 1 Dow. & Ry. (K. B.) 325.

(*p*) *Ex parte Becke* (1832), 3 B. & Ad. 704; *R.* v. *Southampton Justices, Ex parte Lebern* (1907), 96 L. T. 697; *R.* v. *Tipperary Justices*, [1903] 2 I. R. 108.

(*q*) *Ex parte Lewis* (1888), 21 Q. B. D. 191.

(*r*) *R.* v. *Leicestershire Justices* (1813), 1 M. & S. 442; *R.* v. *Suffolk Justices* (1835), 5 Nev. & M. (K. B.) 139; *R.* v. *Hewes* (1835), 3 Ad. & El. 725.

(*a*) *R.* v. *Middlesex Justices* (1877), 2 Q. B. D. 516.

(*b*) *R.* v. *Devon Justices* (1819), 1 Chit. 34.

(*c*) *R.* v. *Middlesex Justices* (1839), 9 Ad. & El. 540.

(*d*) *R.* v. *Kennedy* (1902), 86 L. T. 753.

(*e*) *R.* v. *Ingham* (1849), 14 Q. B. 396, *per* COLERIDGE, J., at p. 401: "The refusal of this rule does not prevent a trial if the prosecutor chooses to go before a grand jury." See also *R.* v. *Russell* (1842), 1 Dowl. (N. S.) 544.

(*f*) *R.* v. *Kesteven Justices* (1844), 3 Q. B. 810; *R.* v. *Flintshire Justices* (1847), 16 L. J. (M. C.) 55.

whether or not proceedings shall be taken on the representations (*g*) is in the nature of a judicial decision (*h*), and if he exercises his discretion in a judicial manner no mandamus will lie to question his decision (*i*).

No mandamus will issue to the archbishop or his vicar-general to command them to hear and decide on objections to the confirmation of the election of a bishop. The confirmation proceedings are not the proceedings of a court in which it is the duty of the archbishop or his vicar-general to pronounce judicially upon objections raised by opponents to a confirmation (*k*).

Local authorities.

**192.** The rule that the court will not question by mandamus the honest decision of a tribunal, even though erroneous, in matters within its jurisdiction, and in regard to which it has been intrusted with a discretion, applies to all tribunals and not only to those of a judicial character.

Accordingly, the writ of mandamus will not issue to command a local authority, having power to approve or disapprove of building plans, to approve plans which they have in good faith rejected (*l*). The rule applies although the withholding of approval was the result of the misconstruction of a statute (*m*). Where, however, the local authority, having no objection to the plans submitted, yet usurp jurisdiction by attaching to their approval a condition which they have no power to enforce, a mandamus will lie commanding them to approve the plans (*n*).

Permissive power.

**193.** The court will not compel any authority to exercise a power which is merely permissive, and which does not impose an

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(*g*) Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 9, which provides that the bishop shall take steps to have the matter of the representation tried in the way prescribed "unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings shall not be taken on the representation." See, further, title ECCLESIASTICAL LAW.

(*h*) *R.* v. *London* (*Bishop*) (1889), 24 Q. B. D. 213, C. A., *per* Lord ESHER, M.R., at p. 225.

(*i*) *Allcroft* v. *London* (*Bishop*), [1891] A. C. 666, *per* Lord HALSBURY, L.C., at p. 675: "To justify any writ of mandamus, it must be made to appear that the bishop had not exercised the jurisdiction which the statute vested in him. Your lordships have nothing to do with the question whether his judgment is right or wrong"; and *per* Lord HERSCHELL, at p. 680: "When the statute prescribes that the bishop's opinion is to be formed after considering the whole of the circumstances of the case, I think it must mean that the bishop is to consider all the circumstances which appear to him, honestly exercising his judgment, to bear upon the particular case, and upon the question whether he ought in that case to prevent proceedings being taken. I dissent entirely from the view that it is for the courts or your lordships to determine what are the considerations which ought to govern the bishop's opinion."

(*k*) *R.* v. *Canterbury* (*Archbishop*), [1902] 2 K. B. 503. See, further, title ECCLESIASTICAL LAW.

(*l*) *Smith* v. *Chorley Rural Council*, [1897] 1 Q. B. 678, C. A.; *R.* v. *Eastbourne Corporation* (1900), 83 L. T. 338, C. A.; *R.* v. *Chiswick Urban District Council, Ex parte Brickell* (1908), 72 J. P. 165.

(*m*) *R.* v. *Eastbourne Corporation*, *supra*, where the local authority had declined to approve plans because they thought, in good faith, that the proposed building would contravene the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52), s. 3.

(*n*) *R.* v. *Tynemouth Rural District Council*, [1896] 2 Q. B. 219.

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obligation (*o*). Where, however, a statute has been interpreted and action taken in the light of matters which ought not to have been taken into account, that is to say, which the court consider not to be proper for the guidance of the discretion intrusted to the persons concerned, the latter will be considered not to have exercised their discretion according to law, and a mandamus will issue commanding them to exercise the powers given them under the statute in question (*p*).

The court will not grant a mandamus commanding the attorney-general to issue his fiat which he has in the exercise of his discretion refused (*q*). Nor will the writ go to a visitor of a cathedral (*r*) or of a college (*s*). But a mandamus was allowed to go to a visitor to hear and determine an appeal when he had heard evidence but had declined to act thereon (*t*). Nor does it lie to a bishop, who has by law the power of approval or disapproval in the matter, to admit a certain person to the office of deputy registrar of the diocese (*a*); nor to the General Medical Council to restore to the medical register a name which has been removed for reasons in regard to which the Council are by statute sole judges (*b*).

Voluntary associations.

**194.** No mandamus will go to the officers of voluntary associations or societies. So the writ will not lie to the provost and fellows of a college to restore an individual to a fellowship (*c*), nor to the benchers of any of the inns of court to compel them to admit a certain person as a student of the society (*d*), or to call a student to the Bar (*e*). Such societies have absolute discretion as to the management of their own affairs, and there is accordingly no legal right that can be enforced against them by mandamus (*f*).

SUB-SECT. 4.—*Conditions precedent to issue of Mandamus.*

Legal right must exist.

**195.** The applicant for a writ of mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought (*g*). In order,

(*o*) *Re Ham Local Board of Health* (1857), 26 L. J. (M. C.) 64; *Julius* v. *Oxford* (*Bishop*) (1880), 5 App. Cas. 214; *R.* v. *Lunacy Commissioners*, [1897] 1 Q. B. 630.

(*p*) *R.* v. *St. Pancras Vestry* (1890), 24 Q. B. D. 371, C. A.

(*q*) *R.* v. *Newton* (1855), 24 L. J. (Q. B.) 246.

(*r*) *R.* v. *Chester* (*Bishop*) (1747), 1 Wm. Bl. 22; *R.* v. *Rochester* (*Dean and Chapter*) (1851), 17 Q. B. 1; *R.* v. *Chester* (*Dean and Chapter*) (1850), 15 Q. B. 513.

(*s*) *Ex parte Buller* (1855), 3 W. R. 447; *R.* v. *Ely* (*Bishop*) (1788), 2 Term Rep. 290, *per* BULLER, J., at p. 337. As to visitors generally, see title CHARITIES, Vol. IV., pp. 287 *et seq.*

(*t*) *R.* v. *Worcester* (*Bishop*) (1815), 4 M. & S. 415.

(*a*) *R.* v. *Gloucester* (*Bishop*) (1831), 2 B. & Ad. 158.

(*b*) *Ex parte La Mert* (1863), 33 L. J. (Q. B.) 69. See the Medical Act (21 & 22 Vict. c. 90), s. 29; and title MEDICINE AND PHARMACY.

(*c*) *Ex parte Buller*, *supra*; see also *R.* v. *Hertford College* (1878), 3 Q. B. D. 693, C. A.

(*d*) *R.* v. *Lincoln's Inn* (*Benchers*) (1825), 4 B. & C. 855, *per* BAILEY, J., at p. 860.

(*e*) *R.* v. *Gray's Inn* (*Benchers*) (1780), 1 Doug. (K. B.) 353, *per* Lord MANSFIELD, at p. 355. As to the admission of students to inns of court and call to the Bar, see title BARRISTERS, Vol. II., pp. 362 *et seq.*

(*f*) As to this point, see, further, *infra*.

(*g*) *Ex parte Napier* (1852), 18 Q. B. 692, *per* Lord CAMPBELL, C.J., at p. 695:

therefore, that a mandamus may issue to compel something to be done under a statute, it must be shown that the statute imposes a legal duty (*h*). It is only in respect of a legal right that mandamus will lie. The court will not, therefore, enforce an equitable right by this remedy (*i*).

Duties must be public.

**196.** The writ is only granted to compel the performance of duties of a public nature (*j*). It will not, accordingly, issue for a private purpose, that is to say, for the enforcement of a merely private right (*k*). The court will not, therefore, interfere in cases of dispute between members of private corporations, even though carrying on business under a royal charter (*l*).

Right must be in applicant.

**197.** The legal right to enforce the performance of a duty must be in the applicant himself (*m*). The court will, therefore, only

"The applicant must make out that there is a legal obligation on the East India Company to pay him the sum he demands, and that he has no remedy to recover it by action. The latter point becomes material only when the former has been established; for the existence of a legal right or obligation is the foundation of every writ of mandamus"; *R.* v. *London Corporation* (1786), 1 Term Rep. 423, *per* ASHHURST, J., at p. 426: "We would grant the mandamus in order that the right might be tried if there were any ground for it. But here is nothing to be tried. The mandamus is applied for merely to see whether there is anything to be tried or not"; see also *R.* v. *Lincoln's Inn* (*Benchers*) (1825), 4 B. & C. 855.

(*h*) *York and North Midland Rail. Co.* v. *Milner* (*Sir W.*) (1846), 15 L. J. (Q. B.) 379, 380, Ex. Ch. "The writ, therefore, commands something to be done which is not shown to be required by the statute, and is therefore not valid in law; and the judgment of the court below awarding a peremptory mandamus must be reversed"; *Re Smyth, R.* v. *Treasury* (*Lords*) (1836), 4 Ad. & El. 976, *per* Lord DENMAN, C.J., at p. 981; *Ex parte Ricketts* (1836), 4 Ad. & El. 999, 1001, where there was "no pretence for saying that the half-pay was so vested as to entitle an administrator to call upon a public board to pay it over," and, accordingly, a mandamus calling upon the Lords of the Admiralty to make such payment was refused; *R.* v. *Southampton Port Commissioners* (1870), L. R. 4 H. L. 449, *per* CLEASBY, B., at p. 465; *Dartford Rural Council* v. *Bexley Heath Rail. Co.*, [1898] A. C. 210; *R.* v. *Glamorgan County Council*, [1899] 2 Q. B. 536, C. A.; *Ex parte Edmunds* (1872), 25 L. T. 705; *R.* v. *Postmaster-General* (1873), 28 L. T. 337.

(*i*) *R.* v. *Stafford* (*Marquis*) (1790), 3 Term Rep. 646, *per* BULLER, J., at p. 651: "For it appears to me on these affidavits that this is a trust, and therefore that the remedy is in a court of equity. A party applying for a mandamus must make out a legal right."

(*j*) See p. 77, *ante*.

(*k*) Com. Dig. tit. Mandamus, A; *R.* v. *Bank of England* (1819), 2 B. & Ald. 620, *per* BAYLEY, J., at p. 622: "The court never grant this writ except for public purposes, and to compel the performance of public duties. This is an application, at the instance of one of several partners in a trading company, to compel his co-partners to divide their profits: but that is a mere private purpose, and presents a fit subject for inquiry on the other side of the hall. There is no instance in which the court have granted a mandamus to a trading corporation"; *R.* v. *London Assurance Co.* (1822), 5 B. & Ald. 899, 901: "This company, although carried on under a royal charter, is a mere private partnership"; *R.* v. *Clear* (1825), 4 B. & C. 899, *per* HOLROYD, J., at p. 901, followed in *Ex parte Briggs* (1859), 28 L. J. (Q. B.) 272, a mandamus to inspect churchwardens' accounts being refused in each case because the applicants had shown no special or public ground for such inspection. "His right as a parishioner is a mere private right, for which the court will not grant it (*R.* v. *Clear*, *supra*, *per* HOLROYD, J., at p. 901).

(*l*) *R.* v. *Bank of England*, *supra*; *R.* v. *London Assurance Co.*, *supra*.

(*m*) "The prosecutor must be clothed with a clear legal and equitable right

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enforce the performance of statutory duties by public bodies on the application of a person who can show that he has himself a legal right to insist on such performance (*n*). The mere fact that a person is interested in the performance of a duty as a member of a class of persons, all of whom may be regarded as equally interested, but himself having no particular ground for claiming such performance (*o*), or that he has some ulterior purpose to serve, but no immediate interest on his own or any other person's behalf (*p*), will not be sufficient grounds for granting a mandamus.

A clergyman has no such legal right as will enable him to claim a mandamus to compel his institution to a presentation benefice; the legal right that can be so enforced is in his patrons (*q*).

Application must be made in good faith.

**198.** Not only must it appear that the applicant is himself a person having a real interest in the performance of the duty sought to be enforced, but also that he makes the application in good faith and not for an indirect purpose (*r*). If it appears that the

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to something which is properly the subject of the writ, as a legal right by virtue of an Act of Parliament" (Tapping on Mandamus, at pp. 27, 28, approved in *R.* v. *Lewisham Union*, [1897] 1 Q. B. 498, *per* WRIGHT, J., at p. 500).

(*n*) "This court has never exercised a general power to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus should have a legal and specific right to enforce the performance of those duties" (*R.* v. *Lewisham Union*, *supra*, *per* BRUCE, J., at p. 501).

(*o*) *R.* v. *London* (*City*) *Assessment Committee*, [1907] 2 K. B. 764, C. A., where a mandamus was sought at the instance of the corporation of the city of London to direct the assessment committee of the City of London Union to make certain entries in the valuation lists. "The sole ground for the application is that the rating authority is interested in the proper performance of its statutory duty by the assessment committee. That, in itself, is an inadequate reason. It is altogether too broad a proposition to say that the mere fact of its being interested in the proper performance by the assessment committee of its duty, justifies the granting of such a mandamus to the rating authority. Every ratepayer of every other parish is interested in the insertion of every hereditament in a parish and in the proper valuation by the assessment committee of the hereditaments which are inserted in the valuation list, but, as I read the Act, ratepayers of other parishes cannot individually complain of such matters, and certainly cannot obtain a mandamus such as here applied for" (*ibid.*, *per* FLETCHER MOULTON, L.J., at p. 793); *R.* v. *Chichester* (*Bishop*) (1859), 29 L. J. (Q. B.) 23, where a rule was discharged calling upon the bishop to show cause why a mandamus should not issue commanding him to issue a commission under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86). "In the case before the court the party applying for the writ of mandamus is a total stranger to the diocese of Chichester, and in no way interested in the matter charged . . . more than any other clerk in holy orders in the most remote part of the kingdom . . . this court ought not to interfere upon the application of a party who is not shown to be a party aggrieved or to have some connexion with the parish or diocese" (*ibid.*, *per* HILL, J., at p. 29); *R.* v. *Clear* (1825), 4 B. & C. 899, 901, where an application for a mandamus for the inspection of churchwardens' accounts was refused, because the applicant's "right as a parishioner is a mere private right."

(*p*) *R.* v. *Bank of England* (*Governor etc.*), [1891] 1 Q. B. 785, where a next of kin and unclaimed money agent was refused a mandamus to inspect a list of unclaimed dividends for the general purpose of his business.

(*q*) *R.* v. *Orton Vicarage Trustees* (1849), 14 Q. B. 139.

(*r*) *R.* v. *Peterborough Corporation* (1875), 44 L. J. (Q. B.) 85.

application for the mandamus is really on behalf of some third party the writ will be refused (*s*).

Demand for performance must precede application.

**199.** The writ will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply (*t*). This must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce, and that such demand was met by a refusal (*a*).

Although a mere withholding of compliance with the demand is not sufficient ground for a mandamus (*b*), yet it is not necessary that there should have been a refusal in as many words. All that is necessary in order that a mandamus may issue is to satisfy the court that the party complained of has distinctly determined not to do what is demanded (*c*).

Possibility of effective enforcement.

**200.** A mandamus will not go when it appears that it would be futile in its result. Accordingly, the court will not, by mandamus, order something which is impossible of performance by reason of the circumstance that the doing of the act would involve a contravention of law (*d*), or because the party against whom the mandamus is prayed does not, for some other reason, possess the power to obey (*e*); nor will a mandamus be granted if the party

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(*s*) *R.* v. *Liverpool, Manchester and Newcastle-upon-Tyne Rail. Co.* (1852), 21 L. J. (Q. B.) 284; *R.* v. *Wimbledon Urban District Council, Ex parte Hatton* (1897), 77 L. T. 599.

(*t*) *R.* v. *Brecknock and Abergavenny Canal Co.* (1835), 3 Ad. & El. 217, *per* COLERIDGE, J., at p. 224.

(*a*) *Ibid.*; *R.* v. *Bristol and Exeter Rail. Co.* (1843), 4 Q. B. 162; *R.* v. *Wilts and Berks Canal Co.* (1835), 3 Ad. & El. 477; *R.* v. *Sealey* (1844), 8 Jur. 496; see also *R.* v. *Bodmin Corporation*, [1892] 2 Q. B. 21. It is not necessary to request an inferior court to make any specific order, provided it is requested to exercise its jurisdiction generally in the matter (*R.* v. *Cornwall Justices*, [1903] 2 K. B. 178).

(*b*) *R.* v. *Bristol and Exeter Rail. Co.*, *supra*, *per* Lord DENMAN, C.J., at p. 170.

(*c*) *R.* v. *Brecknock and Abergavenny Canal Co.*, *supra*, *per* Lord DENMAN, C.J., at p. 222, and *per* LITTLEDALE, J., at p. 223: "It is not necessary that there should have been a refusal in so many words; but here the company only answered the application by requiring an indemnity. There should, after that, have been a formal and distinct demand, to warrant this motion"; *R.* v. *Bristol and Exeter Rail. Co.*, *supra*; *R.* v. *Wilts and Berks Canal Co.*, *supra*, *per* LITTLEDALE, J., at p. 483: "There is no question as to the right which every proprietor has under the Act to inspect the books and papers at reasonable times . . . when the committee had said that they would take time, the first application should have been followed up by a further demand upon them." As it was there had been no refusal.

(*d*) *R.* v. *Eastbourne Corporation* (1900), 83 L. T. 338, C. A., where a mandamus was refused because it was sought thereby to compel the approval of plans authorising buildings which were not in accordance with statutory requirements.

(*e*) *R.* v. *Ely* (*Bishop*) (1750), 1 Wm. Bl. 52, *per* LEE, C.J., at p. 58: "The court never grants a mandamus, except it indisputably sees that there is a power lodged in the person to whom the mandamus is prayed"; *Re Bristol and North Somerset Rail. Co.* (1877), 3 Q. B. D. 10, 13, where the court refused to enforce by mandamus an order which "imposes on a virtually defunct company a duty which it is impossible for them to discharge." The duty it was sought to compel was to replace a level crossing by a bridge, the company having no funds, and no power of raising any. *R.* v. *London and North Western Rail. Co.*

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complained of has powers which would enable him to make the writ inoperative (*f*); or when it seems that obedience to the command would not be followed by any result different from that in respect of which complaint is made (*g*).

No mandamus will issue in order to effect what amounts to an evasion of a statute (*h*), or a breach of trust (*i*).

No other legal remedy.

**201.** The court will, as a general rule, and in the exercise of its discretion, refuse a writ of mandamus, when there is an alternative specific remedy at law which is not less convenient, beneficial and effective (*k*).

Alternative remedies which thus exclude the remedy by writ of mandamus are petition of right (*l*), *quo warranto* (*m*), *quare impedit* (*n*), *certiorari* (*o*), appeal to quarter sessions (*p*), and execution, even though it may be fruitless in its results (*q*). Nor

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(1851), 6 Ry. & Can. Cas. 634, where it was held that the fact that compulsory powers to acquire land had expired was an answer to a mandamus to command the purchase of the lands necessary for constructing a branch line; see also *R.* v. *Hall and Dyer* (1835), 1 Har. & W. 83, n.

(*f*) *R.* v. *Axbridge Corporation* (1777), 2 Cowp. 523, where one reason for refusing a mandamus to restore a town clerk to his office was that the coporation "would undoubtedly remove him again the very instant he should be restored"; *R.* v. *Wilson* (1880), 43 L. T. 560, C. A., where a mandamus to command the vicar to fix a certain hour for vestry meetings was refused because it would not prevent the vicar calling a meeting at any time he chose.

(*g*) *Ex parte Joyce* (1854), 23 L. J. (M. C.) 153, where a mandamus to hold an election, applied for on the ground that certain votes had been improperly rejected, was refused, because it did not appear that the result of the election would have been different if the rejected votes had been allowed; compare *R.* v. *Birmingham* (*Rector*) (1837), 7 Ad. & El. 254.

(*h*) *R.* v. *Eastern Counties Rail.* (1843), 12 L. J. (Q. B.) 271; *R.* v. *West Riding of Yorkshire Justices* (1834), 1 Ad. & El. 563.

(*i*) *R.* v. *St. Saviour's, Southwark* (*Churchwardens*) (1834), 1 Ad. & El. 380.

(*k*) *Re Barlow, Rector of Ewhurst* (1861), 30 L. J. (Q. B.) 271, *per* HILL, J.: "This is not a rule of law, but a rule regulating the discretion of the court in granting writs of mandamus; and unless the court can see clearly that there is another remedy equally convenient, beneficial, and effectual, the writ of mandamus will be granted, provided the circumstances are such in other respects as to warrant the granting of the writ"; *R.* v. *Registrar of Joint Stock Companies* (1888), 21 Q. B. D. 131; *R.* v. *Stepney Corporation* (1902), 1 K. B. 317, *per* Lord ALVERSTONE, C.J., at p. 321. See also *R.* v. *Leicester Union*, [1899] 2 Q. B. 632; *R.* v. *Bermondsey Borough Council, Ex parte Bermondsey Guardians* (1908), 99 L. T. 14; and pp. 103, 105, *post*.

(*l*) *Re Nathan* (1884), 12 Q. B. D. 461, C. A., and p. 26, *ante*.

(*m*) *R.* v. *Colchester* (*Mayor*) (1788), 2 Term Rep. 259; *R.* v. *St. Martin's in the Fields Guardians* (1851), 17 Q. B. 149; and see p. 128, *post*.

(*n*) *R.* v. *Chester* (*Bishop*) (1786), 1 Term Rep. 396; *R.* v. *Orton Vicarage Trustees* (1849), 14 Q. B. 139.

(*o*) *R.* v. *Owen, Ex parte Scovell* (1907), 72 J. P. 60; and see p. 155, *post*.

(*p*) *R.* v. *Smith* (1873), L. R. 8 Q. B. 146; *R.* v. *Bristol Justices* (1893), 68 L. T. 225; and compare *R.* v. *Thomas*, [1892] 1 Q. B. 426, *per* HAWKINS, J., at p. 429: "It has been argued that this matter is only the subject of an appeal to quarter sessions. It is quite possible that there might have been good grounds for an appeal if the grounds of the decision had been announced to the applicant, and in that case a mandamus would not be granted, for there would be an adequate remedy by appeal. That rule, however, as to the grant of a mandamus is not inflexible, or applicable in cases of this kind, where a person does not know the grounds of the decision against him and how to shape his appeal."

(*q*) *R.* v. *Victoria Park Co.* (1841), 1 Q. B. 288; and compare *R.* v. *St. Katharine*

will the court interfere to enforce the law of the land by the extraordinary remedy of a writ of mandamus in cases where an action at law will lie for complete satisfaction (*r*).

In accordance with the general rule that where a statute creates an obligation and enforces its performance in a specified manner, such performance cannot be enforced in any other manner (*s*), the remedy by mandamus will not be available when a specific remedy is given by the Act imposing the duty it is sought to enforce (*t*). When a mandamus is refused on the ground that there is another specific remedy, it is a remedy at law that is referred to. The existence of a remedy in equity is no answer to an application for a mandamus (*a*)

Indictments.

**202.** Where the remedy by indictment is ineffective, inasmuch as it only results in punishment and not in procuring for the prosecutor the enforcement of the right to which he is entitled, the existence of such remedy is no answer to an application for a mandamus (*b*). In other cases the general rule will apply, and a mandamus will not go where indictment is the usual procedure (*c*).

Apparently, the fact that an action for a mandamus (*d*) will lie

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*Dock Co.* (1832), 4 B. & Ad. 360, where a mandamus was allowed to go ordering a sum to be paid by the company under an award, there being no other legal remedy, for there was no power to take in execution the goods of the company, and its statute forbade taking in execution the goods of its treasurer.

(*r*) *R.* v. *Bank of England* (1780), 2 Doug. (K. B.) 524; *Ex parte Robins* (1839), 7 Dowl. 566, 569; *R.* v. *Ponsford* (1843), 12 L. J. (Q. B.) 313; *R.* v. *Hull and Selby Rail. Co.* (1844), 13 L. J. (Q. B.) 257.

(*s*) See *Doe* d. *Rochester* (*Bishop*) v. *Bridges* (1831), 1 B. & Ad. 847, 859, and title STATUTES.

(*t*) *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A. C. 387, where a mandamus to a local authority to make necessary sewers under s. 15 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), was refused, because a remedy by complaint to the Local Government Board was provided by s. 299 of the same Act; *R.* v. *Registrar of Joint Stock Companies* (1888), 21 Q. B. D. 131, where a mandamus to compel the Registrar of Joint Stock Companies to file a contract was refused, as another efficient remedy was provided under the Stamp Act, 1870 (33 & 34 Vict. c. 97); *R.* v. *Incorporated Law Society*, [1895] 2 Q. B. 456, where a mandamus to compel the committee of the Incorporated Law Society to hear and report upon an application under s. 13 of the Solicitors Act, 1888 (51 & 52 Vict. c. 65), was refused, because that section enabled an aggrieved party to apply to the court itself; see also *R.* v. *Charity Commissioners for England and Wales*, [1897] 1 Q. B. 407; *R.* v. *London* (*City*) *Assessment Committee*, [1907] 2 K. B. 764, C. A.; *R.* v. *Bermondsey Borough Council, Ex parte Bermondsey Guardians* (1908), 99 L. T. 14.

(*a*) *R.* v. *Stafford* (*Marquis*) (1790), 3 Term Rep. 646, *per* BULLER, J., at p. 651; *R.* v. *Southampton Port Commissioners* (1870), L. R. 4 H. L. 449, *per* BLACKBURN, J., at p. 471.

(*b*) *R.* v. *Severn and Wye Rail. Co.* (1819), 2 B. & Ald. 646, "where a mandamus was granted to compel a corporation to reinstate and lay down a railway although an indictment would have lain for the non-repair; for the only direct effect of the indictment would have been the punishment of the defendants by fine, and not procuring for the prosecutors the benefit which they sought" (*R.* v. *Victoria Park Co.* (1841), 1 Q. B. 288, *per* Lord DENMAN, C.J., at p. 291); *Ex parte Robins* (1839), 7 Dowl. 566, 569; *R.* v. *Bristol Dock Co.* (1841), 2 Q. B. 64.

(*c*) *R.* v. *St. Mary, Norwich, Overseers* (1791), Nolan, 28; *R.* v. *Surrey County Treasurer* (1819), 1 Chit. 650; *R.* v. *Oxford and Witney Roads Trustees* (1840), 12 Ad. & El. 427; *Ex parte Downton Overseers* (1858), 27 L. J. (M. C.) 281.

(*d*) The action for mandamus was instituted by the Common Law Procedure

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does not necessarily exclude the remedy by prerogative writ of mandamus (*e*).

SUB-SECT. 5.—*Statutory Forms of Mandamus.*

(i.) *In General.*

Statutory mandamus.

**203.** There must be distinguished from the prerogative writ of mandamus certain forms of mandamus, or orders in the nature of mandamus, which have come into existence under statutory authority, either for the purpose of providing a method of procedure more convenient than that by way of the prerogative writ, or in order to provide a particular method of enforcing particular statutory obligations.

(ii.) *Action of Mandamus and Interlocutory Mandamus.*

Action of mandamus.

**204.** A plaintiff may, in any action, claim a mandamus to command the defendant to discharge any duty in the fulfilment of which the plaintiff is personally interested (*f*), such claim being indorsed upon the writ of summons (*g*).

A mandamus may also be granted by an interlocutory order of the court in all cases in which it appears to the court to be just and convenient that such order should be made (*h*). In the exercise of its discretion the court will refuse an interlocutory mandamus when an action of mandamus is pending,

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Act, 1854 (17 & 18 Vict. c. 125), s. 68, now repealed. See, now, R. S. C., Ord. 53; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8).

(*e*) In *R.* v. *Lambourn Valley Rail. Co.* (1888), 22 Q. B. D. 463, it was held that as there was a remedy by action of mandamus a writ of mandamus ought not to issue. In *R.* v. *St. George the Martyr, Southwark, Vestry* (1892), 61 L. J. (Q. B.) 398, however, WRIGHT, J., said: "The decision in the Lambourn Valley Railway case is intended to apply, and must be understood as applying, only to a case where the duty sought to be enforced, as well as the right to claim, are, in substance, of a private nature, and that it does not extend to any case where the duties sought to be enforced are merely of a public nature"; and in *R.* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 512, he said of the same case, "POLLOCK, B., in the course of his judgment, appears to say that it is an answer to an application for a prerogative writ of mandamus if it is shown that a mandamus could have been granted for the same purpose in an action. I say, and I have said, with the assent of other judges at various times, that that would be unduly to narrow the powers of this court to grant a prerogative writ of mandamus"; compare *R.* v. *London and North Western Rail. and Great Western Rail.* (1896), 65 L. J. (Q. B.) 516; *R.* v. *St. Giles, Camberwell, Vestry* (1897), 66 L. J. (Q. B.) 337.

(*f*) R. S. C., Ord. 53, r. 1, which is founded on the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 68, repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49).

"In 1854, a remedy which did not exist before was given by the legislature, viz., an action of mandamus, which is in fact for a decree ordering the performance of the duty which the court thinks ought to be done" (*R.* v. *Lambourn Valley Rail. Co.*, *supra*, *per* MANISTY, J., at p. 469).

"The action for a mandamus is simply an attempt to engraft upon the old common law remedy a right in the nature of specific performance" (*Baxter* v. *London County Council* (1890), 63 L. T. 767, *per* DAY, J., at p. 771).

(*g*) R. S. C., Ord. 53, r. 1. For the form of indorsement, see *ibid.*, Appendix A, Part III., iv., and Ord. 53, r. 2. The rules as to pleadings applicable to other actions apply to actions of mandamus.

(*h*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8).

unless it is shown that some evil will result from such refusal (*i*). It may, however, be granted even though the application is made after judgment (*k*), an interlocutory order here meaning any order other than final judgment in an action (*l*).

When available.

**205.** The cases in which a mandamus will be granted in an action are not confined to those in which, before the creation of the action of mandamus, the prerogative writ of mandamus would lie (*m*). The action of mandamus will lie where the party claiming the mandamus has a right of action (*n*), whether or not there is a right to claim damages (*o*), and has no other equally convenient and effective remedy (*p*). It is, in effect, a remedy ancillary to such a right of action (*q*). It will not lie for the purpose of enforcing a duty arising merely from a personal contract (*r*), nor will it be allowed to supersede the prerogative writ of mandamus in cases where the latter has always been the appropriate and effective remedy (*s*), as where there is a right, but a right in respect of which no action will lie (*t*). It is doubtful, however, where it is clearly more speedy, cheap, and convenient to claim a mandamus in an action than the prerogative writ, whether the latter will be refused (*a*).

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(*i*) *Widnes Alkali Co.* v. *Sheffield and Midland Rail. Co.'s Committee* (1877), 37 L. T. 131.

(*k*) *Easton & Co.* v. *Nar Valley Drainage Commissioners* (1892), 8 T. L. R. 649, where an interlocutory mandamus was granted to compel the levy of a rate to discharge a debt due under a judgment.

(*l*) *Smith* v. *Cowell* (1880), 6 Q. B. D. 75, C. A.

(*m*) In *Benson* v. *Paul* (1856), 25 L. J. (Q. B.) 274, Lord CAMPBELL, C.J., expressed the opinion that the action of mandamus was confined to such duties as had been enforceable by the prerogative writ; in *Norris* v. *Irish Land Co.* (1857), 27 L. J. (Q. B.) 115, at p. 119, however, he was, on consideration "not prepared to say that that is the exact limit."

(*n*) In *Bush* v. *Beavan* (1862), 32 L. J. (EX.) 54, the court took the view that "the distinction between the prerogative writ of mandamus and the statutory mandamus is, that the former is granted whenever there is a legal right, and no other specific remedy; and the latter can only be granted where the party claiming it has a right of action—the object of s. 68 of the Common Law Procedure Act, 1854, being that the court which tries the right may give the remedy" (*Morgan* v. *Metropolitan Rail. Co.* (1868), L. R. 4 C. P. 97, Ex. Ch., *per* CHANNELL, B., at p. 101); see also *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A., *per* BRETT, L.J., at p. 122.

(*o*) *Fotherby* v. *Metropolitan Rail. Co.* (1866), L. R. 2 C. P. 188.

(*p*) *Bush* v. *Beavan, supra, per* CHANNELL, B., at p. 59; see also *Ex parte Page* (1897), 14 T. L. R. 34.

(*q*) *Smith* v. *Chorley District Council*, [1897] 1 Q. B. 532, *per* KENNEDY, J., at p. 540.

(*r*) *Benson* v. *Paul, supra*; *Norris* v. *Irish Land Co., supra*; *Fotherby* v. *Metropolitan Rail. Co., supra, per* BYLES, B., at p. 195.

(*s*) *Baxter* v. *London County Council* (1890), 63 L. T. 767.

(*t*) *Ibid., per* DAY, J., at p. 771: "In my opinion the action is improperly brought; I have never yet heard of an action brought against justices *quâ* justices . . . they are administering as justices the county rate, in which the whole county is interested; and they can only be made responsible by means of the well-known process of law, and that is, an application for a prerogative writ of mandamus."

(*a*) *R.* v. *St. Giles, Camberwell, Vestry* (1897), 66 L. J. (Q. B.) 337; and compare *Smith* v. *Chorley District Council, supra, per* KENNEDY, J., at pp. 537, 538.

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Effect of judgment.

**206.** No writ of mandamus can now be issued in an action, but the judgment or order in an action of mandamus has the same effect as a writ of mandamus formerly had (*b*). If judgment is given for the plaintiff, the court or judge may order the defendant to perform the duty in question, either forthwith or on the expiration of a certain time (*c*).

Time.

**207.** The time within which a party is able to seek a remedy by mandamus is not limited by the Statute of Limitations (*d*).

(iii.) *Statutory Provisions for Issue of Mandamus.*

Under Public Health Act, 1875.

**208.** It is provided that, where complaint is made to the Local Government Board that a local authority has made default in the provision or maintenance of sewers, or in regard to water supply, or in the enforcement of the provisions of the Public Health Act, 1875, the Local Government Board shall, if satisfied after inquiry that there has been such default, order the authority in default to perform the duty the neglect of which has caused complaint to be made. If such duty is not performed within the time laid down in such order it may be enforced by writ of mandamus (*e*).

Under Education Acts.

The Board of Education is empowered after public inquiry to order any local education authority to perform any duty under the Education Acts in respect of which such authority is in default. It is provided that such order may be enforced by mandamus (*f*).

Under Local Loans Act, 1875.

A mandamus may be claimed in an action to enforce payment by a local authority of a sum due in respect of a security issued by them under the Local Loans Act, 1875 (*g*).

(iv.) *Order in the nature of a Mandamus to Justices.*

Against justices.

**209.** In all cases where justices of the peace refuse to do any act relating to the duties of their office, the party requiring such act to be done may apply to the High Court, upon an affidavit of the facts, for a rule calling upon such justices, and also the party to be affected by such act, to show cause why such act should not be done. If, after due service of such rule, good cause is not shown against it, the court may make the same absolute, and the justices are then required to perform the act in question (*h*).

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(*b*) R. S. C., Ord. 53, r. 4.

(*c*) *Ibid.*, r. 3.

(*d*) *Ward* v. *Lowndes* (1859), 29 L. J. (Q. B.) 40, Ex. Ch. As to the time within which an application should be made, see p. 111, *post*.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 299; and see title PUBLIC HEALTH ETC. For an instance of the issue of a mandamus under this section, see *R.* v. *Staines Union* (1893), 62 L. J. (Q. B.) 540.

(*f*) Education Act, 1902 (2 Edw. 7, c. 42), s. 16; and see title EDUCATION. For an instance of the issue of the writ of mandamus thereunder, see *A.-G.* v. *West Riding of Yorkshire County Council*, [1907] A. C. 29.

(*g*) Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 11; and see title LOCAL GOVERNMENT. As to municipal elections, see p. 80, *ante*.

(*h*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 5; *R.* v. *Dayman* (1857), 26 L. J. (M. C.) 128, *per* Lord CAMPBELL, C.J., at p. 131, referring to this remedy: "The present mode of proceeding under the statute is merely a substitute for the old prerogative writ of mandamus, being a more speedy and economical remedy." See also title MAGISTRATES.

The operation of this provision is not confined to cases in which justices need protection (*i*). In many cases the remedy by writ of mandamus and that by order in the nature of mandamus are co-ordinate (*k*). The remedy by order in the nature of a mandamus will, however, only be applicable in cases where the writ would lie (*l*). No action or proceeding may be commenced or prosecuted against any justices for obeying a rule under the above provision or doing the act thereby required to be done (*m*).

Justices refusing to state case.

**210.** Where justices refuse to state a case for the opinion of the High Court upon a point of law arising in an information or complaint determinable by such justices in a summary way upon the application of either party to the proceeding (*n*), the party asking for such case may apply to the High Court, upon an affidavit of the facts, for a rule calling upon the justices and the other party to the proceeding in which the determination was given, to show cause why such case should not be stated (*o*). Together with this provision must be read the further provision (*p*), that any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may, on such court of summary jurisdiction declining to state a case, apply to the High Court for an order requiring the case to be stated (*q*).

A magistrate will not be ordered to state a case on a point of law which he has decided in accordance with a previous decision of the High Court (*r*).

(v.) *Order in the nature of a Mandamus to County Court Judge.*

County court judge.

**211.** No writ of mandamus will now issue to a judge or officer of a county court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to

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(*i*) *R.* v. *Phillimore and Pilling* (1884), 51 L. T. 205 (followed in *R.* v. *Biron* (1884), 14 Q. B. D. 474), overruling *R.* v. *Percy* (1873), L. R. 9 Q. B. 64.

(*k*) *R.* v. *Phillimore and Pilling*, *supra*, *per* Lord COLERIDGE, C.J., at p. 206.

(*l*) *R.* v. *Dayman* (1857), 26 L. J. (M. C.) 128, *per* Lord CAMPBELL, C.J., at p. 131.

(*m*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 5. Before this statute "if justices were compelled by mandamus to do an act, and it turned out that the act, after all, could not be done legally, they were liable to an action. This court, therefore, refused to issue a mandamus to them in doubtful cases, unless they were properly indemnified. But now, in consequence of statute 11 & 12 Vict. c. 44, by which (s. 5) justices are protected when they act in obedience to the process of this court, the burden is shifted; we may issue our process to the justices, even where the law is not quite clear; and the person to be affected by the act commanded may try the question by resisting the order of justices" (*R.* v. *Cotton* (1850), 15 Q. B. 569, *per* COLERIDGE, J., at p. 574).

(*n*) See Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 2.

(*o*) *Ibid.*, s. 5.

(*p*) *Stokes* v. *Mitcheson*, [1902] 1 K. B. 857, *per* CHANNELL, J., at p. 865: "My opinion is that the powers as to stating a case, contained in the Acts of 1857 and 1879, are not separate powers, although there is a slightly different machinery, but that, in substance, the two Acts are to be read together."

(*q*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33 (1). And see title MAGISTRATES.

(*r*) *R.* v. *Shiel* (1900), 82 L. T. 587, C. A.

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the High Court, upon an affidavit of the facts, for an order or summons calling upon such judge or officer, and also the party to be affected by such act, to show cause why such act should not be done. If after the service of such order or summons good cause shall not be shown, the High Court may, by order, direct the act to be done, and the judge or officer in question, upon being served with such order, shall obey the same on pain of attachment (*a*). The City of London Court is within this provision (*b*).

Nonsuit etc.

**212.** A nonsuit compels a party to begin *de novo* should he wish to proceed further (*c*). No order in the nature of a mandamus will accordingly issue to a county court judge to rehear a case in which he has directed a nonsuit (*d*). Nor will he be ordered to do an act when the circumstances are such that prohibition would lie (*e*); nor to issue execution when the amount of the claim is less than that in respect of which power is given to question the judge's decision (*f*); nor to review taxation of costs, that being a matter within his discretion (*g*); nor to re-enter a cause in his list (*h*).

An order will issue compelling a county court judge to sign notes taken by him at a trial (*i*) provided he was asked to take such notes in strict accordance with statutory requirements (*k*). A mere general request to take notes will not suffice for the issue of an order in the nature of a mandamus (*l*).

There can be no second application for an order which has been once refused, unless grounds can be shown to exist which are different from those on which the first application was founded (*m*).

(vi.) *Order to Coroner to hold Inquest.*

Coroners.

**213.** A judge of the High Court, upon application by or under the authority of the Attorney-General, may order an inquest to be held touching a death in respect of which a coroner refuses or

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(*a*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 131, reproducing 19 & 20 Vict. c. 108, s. 43; see title COUNTY COURTS, Vol. VIII., p. 614.

(*b*) *Ibid.*, s. 185; *Blades* v. *Lawrence* (1874), L. R. 9 Q. B. 374.

(*c*) As to nonsuit in a county court, see title COUNTY COURTS, Vol. VIII., p. 538.

(*d*) *Fortescue* v. *Paton* (1860), 3 L. T. 268; *Kershaw* v. *Chantler* (1872), 26 L. T. 474.

(*e*) *Re Brown* v. *London and North Western Rail. Co.* (1863), 32 L. J. (Q. B.) 318; as to prohibition, see p. 141, *post;* and title COUNTY COURTS, Vol. VIII., p. 611.

(*f*) *Brown* v. *Taylor* (1868), 18 L. T. 657.

(*g*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 118 (reproducing a similar provision of 19 & 20 Vict. c. 108, s. 35); *Clifton* v. *Furley* (1862), 7 H. & N. 783.

(*h*) *Morgan* v. *Rees* (1881), 6 Q. B. D. 508, C. A.

(*i*) See County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120.

(*k*) *Ibid.* As to the request to take a note, see title COUNTY COURTS, Vol. VIII., p. 604.

(*l*) *Morgan* v. *Rees*, *supra*, where the rule was discharged because the judge had not been asked in the proper way to take notes. It was pointed out by Lord COLERIDGE, C.J., however, that "no harm will be done, for if upon the hearing of an appeal any injustice is likely to be done by the absence of a county court judge's notes, the court has power to dispense with them."

(*m*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 132.

neglects to hold an inquest, or in respect of which it is necessary or desirable, in the interests of justice, that another inquest should be held, by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise (*n*).

(vii.) *Rule to Revising Barrister to State a Case.*

Revising barristers.

**214.** A person desiring to appeal from the decision of a revising barrister on a point of law (*o*) may, on the revising barrister's neglecting or refusing to state a case for the purpose of such appeal, within one month after such neglect or refusal apply to the High Court, upon affidavit of the facts, for a rule calling upon the revising barrister, and on the person, if any, in whose favour the decision from which the applicant desires to appeal was given, to show cause why a rule should not be made directing the appeal to be entertained and the case to be stated; and thereupon the High Court, or any judge thereof in chambers, may make such rule to show cause and make the same absolute or discharge it, and the revising barrister, on being served with any such rule absolute, shall state the case accordingly (*p*). The case is stated and the appeal heard notwithstanding any limitations of time or place contained in the Parliamentary Voters Registration Act, 1843 (*q*).

The statement submitted by a revising barrister to the court in answer to a rule *nisi* should be in the form of an affidavit (*r*).

(viii.) *Order to Arbitrator to State a Case.*

Arbitrators.

**215.** The High Court or a judge thereof may direct a referee, arbitrator, or umpire to state in the form of a special case, for the opinion of the court, any question of law arising in the course of a reference (*s*). The court will order a special case to be stated when satisfied that there is a real point of law and that the arbitrator is not specially qualified to deal with it (*t*).

(ix.) *Mandamus to Examine Witnesses in India and other Parts of His Majesty's Dominions.*

Examination of witnesses abroad.

**216.** A writ in the nature of a mandamus or commission may be issued in England for the examination of witnesses (*a*) in

(*n*) Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 6 (1); see title CORONERS, Vol. VIII., pp. 255, 287.

(*o*) There is no appeal on a question of fact only (Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), s. 65; Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 35).

(*p*) Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 37; as to the duty of a revising barrister to state a case, see title ELECTIONS.

(*q*) *Ibid.*

(*r*) *R.* v. *Nepean, Ex parte Jenkins* (1903), 52 W. R. 264.

(*s*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 19. See title ARBITRATION, Vol. I., pp. 464 *et seq.*

(*t*) *Re Nuttall and Lynton and Barnstaple Rail. Co.* (1899), 82 L. T. 17, C. A., *per* COLLINS, L.J., at p. 20.

(*a*) The tendency is now to abandon the practice of issuing a mandamus for the examination of witnesses abroad, and instead to issue a letter of request for the same purpose; see R. S. C., Ord. 37, r. 6A, and titles EVIDENCE; PRACTICE AND PROCEDURE.

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India (*b*), or in any colony or other part of His Majesty's dominions abroad (*c*), in respect of any action depending in England, in whatsoever country the cause of action has arisen (*d*), including England (*e*). A mandamus will not be issued under these provisions for the examination of witnesses in Scotland (*f*), nor, in general, for the examination of witnesses in any part of the King's dominions beyond the seas in cases where a commission will attain the same end with less delay and expense (*g*). Distance and the smallness of the claim are, however, no grounds for refusing the writ (*h*).

Either party may apply for the writ (*i*). The names of the witnesses need not necessarily be stated, but there must be some certain description of them (*k*).

The rule, which is ordinarily *nisi* in the first instance, and not absolute (*l*), may be granted without the production of any affidavit when the application is that of the Attorney-General (*m*).

**Examination of witnesses in respect of criminal proceedings.**

**217.** A writ of mandamus may similarly be granted in England for the examination of witnesses in India, or elsewhere within the British dominions abroad, in respect of indictments or informations laid or exhibited in the High Court in England for misdemeanours or offences committed in India or in any other part of His Majesty's dominions (*n*).

SUB-SECT. 6.—*Procedure.*

(i.) *The Order Nisi.*

**Application for order *nisi*.**

**218.** Application for a prerogative writ of mandamus, or for an order in the nature of a mandamus to justices, to a county court judge, or to justices to state and sign a case, is made to a divisional court of the King's Bench Division by motion for an order *nisi*. In vacation, if the matter is urgent, an application may be made to a judge in chambers for a summons to show cause (*o*).

The application may be made *ex parte* (*p*). Where, however, it is intended to apply for a mandamus to command the holding of a

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(*b*) East India Company Act, 1772 (13 Geo. 3, c. 63), s. 44.

(*c*) Evidence on Commission Act, 1831 (1 Will. 4, c. 22), s. 1.

(*d*) *Ibid.*; as to the power of the court to nominate an examiner in such cases, see Evidence by Commission Act, 1885 (48 & 49 Vict. c. 74), s. 3.

(*e*) *Bain* v. *De Vetry* (1835), 3 Dowl. 516.

(*f*) *Wainwright* v. *Bland* (1835), 3 Dowl. 653.

(*g*) *Farnworth* v. *Hyde* (1863), 14 C. B. (N. S.) 719.

(*h*) *Dye* v. *Bennett* (1850), 9 C. B. 281.

(*i*) *Grillard* v. *Hogue* (1820), 4 Moore (C. P.), 313.

(*k*) *Rickards* v. *East India Co.* (1839), 3 Jur. 822, where a mandamus was granted to examine as witnesses the treasurer, secretary, and officers of the East India Company at Calcutta.

(*l*) *Doe* d. *Grimes* v. *Pattisson* (1834), 3 Dowl. 35.

(*m*) *R.* v. *Douglas* (1843), 7 Jur. 305.

(*n*) East India Company Act, 1772 (13 Geo. 3, c. 63), s. 40, and Evidence on Commission Act, 1831 (1 Will. 4, c. 22), s. 1.

(*o*) Crown Office Rules, rr. 49, 69, 266. Under the old procedure the motion was for a rule *nisi*.

(*p*) R. S. C., Ord. 52, r. 3, applied to proceedings on the Crown side by Crown Office Rules, r. 232; see also *Gribthorpe School Board* v. *Gribthorpe Overseers, Ex parte Gribthorpe School Board* (1883), 47 J. P. 727.

municipal election (*q*) the applicant must give ten days' notice in writing of such intention. The notice must also set forth the name and description of the applicant and the grounds of the application. With the notice must be delivered a copy of the affidavits to be used in support of the application (*r*).

Two or more persons cannot join in a single application for a writ of mandamus to enforce separate claims. There must be separate applications for separate writs, and this although the several applicants are successors in the office in respect of which the claims arise (*s*).

A particular member of a body may apply for a writ against such body, even though the result will be that the writ goes against himself as well as against the other members (*t*).

Right of audience.

**219.** The prerogative writ of mandamus can only be moved for by counsel (*a*). This rule, furthermore, applies to a motion for an order in the nature of a mandamus (*b*). Nor will a party be heard in person on an appeal from an order of the divisional court making absolute or discharging a rule *nisi* (*c*).

Time for application.

**220.** Except in cases where the delay is duly accounted for (*d*), a mandamus will not be granted unless applied for within a reasonable time (*e*).

It would appear that, in the case of an application for a mandamus or an order in the nature of a mandamus against any person in respect of any act done in pursuance of, or any neglect or default in the execution of, any Act of Parliament or any public duty or authority, proceedings must begin within six months of the act or default complained of, or in the case of a continuing injury or default within six months of the ceasing thereof (*f*).

Every application for a writ of mandamus to justices to enter continuances and hear an appeal must be made within two calendar months after the first day of the sessions at which the refusal to hear took place, unless further time is allowed by the court or a

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(*q*) See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 70; and p. 80, *ante*.

(*r*) *Ibid.*, s. 225.

(*s*) *Ex parte Scott and Morgan* (1840), 8 Dowl. 328.

(*t*) *Anon.* (1818), 2 Chit. 254; *R.* v. *Gadsby* (1837), 1 Nev. & P. (K. B.) 572. In each case a writ was obtained by one of the body of overseers to whom it was directed.

(*a*) *R.* v. *Stanbury Eardley* (1885), 49 J. P. 551; *Ex parte Wason* (1869), 10 B. & S. 580; *Ex parte Whyte* (1896), 12 T. L. R. 458.

(*b*) *Ex parte Wallace*, [1902] 2 K. B. 488, C. A.

(*c*) *R.* v. *Liverpool Corporation* (1891), 55 J. P. 823, C. A.

(*d*) *R.* v. *Stainforth and Keadby Canal Co.* (1813), 1 M. & S. 32; *R.* v. *Robinson* (1765), 1 Wm. Bl. 541.

(*e*) *Broughton* v. *Stamp Duties Commissioner*, [1899] A. C. 251, P. C., where it was held that nine years was an unreasonable time at which to reopen a question as to an alleged over-payment of probate duty; *R.* v. *Cockermouth Inclosure Act Commissioners* (1830), 1 B. & Ad. 378; *R.* v. *Leeds and Liverpool Canal Co.* (1840), 11 Ad. & El. 316; *R.* v. *Robson* (1893), 57 J. P. 133; *R.* v. *Lancashire Justices* (1810), 12 East, 366; *R.* v. *Halifax Road Trustees* (1848), 12 Q. B. 448.

(*f*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1; see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

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judge, or unless special circumstances appear by affidavit to account for the delay to the satisfaction of the court (*g*).

The fact that an applicant is without sufficient means and postpones his application until he can obtain financial assistance is not a special circumstance within this provision which will excuse delay (*h*).

Affidavits in support.

**221.** The motion must be supported by affidavits which show a *primâ facie* case entitling the applicant to the writ (*i*). Accordingly, if an application is made for a mandamus to quarter sessions to hear an appeal, the affidavit must state what occurred at sessions, omitting nothing that is material (*j*). A mandamus to admit to an office will not be granted unless the nature of the office is described, so that the court may see whether it is an office in respect of which the writ will lie (*k*), and unless the applicant shows a good title to the office (*l*). Upon an application for a mandamus to the steward of a manor to enrol a deed pursuant to the Fines and Recoveries Act, 1833 (*m*), the substance of the deed must be set out in the affidavit, but it is not necessary to annex a copy of the whole deed (*n*). Upon a rule for a mandamus to deliver up books and documents upon removal from office through incompetency to fill such office, the ground of such incompetency must be set forth in the affidavits, with verified copies of such documents as are necessary to prove such incompetency (*o*).

There must also be produced, at the time of the motion, an affidavit made by the applicant himself or his solicitor stating at whose instance such motion is made as prosecutor (*p*).

The affidavit must be intituled "In the High Court of Justice, King's Bench Division" (*q*), but without the title of any cause (*r*), and filed in the Crown Office Department of the Central Office of the Supreme Court (*s*). The court will not grant leave to amend an affidavit wrongly intituled, unless satisfied that injustice would be done if such leave were not given (*t*).

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(*g*) Crown Office Rules, r. 68.

(*h*) *R.* v. *Gloucestershire Justices* (1890), 54 J. P. 519.

(*i*) R. S. C., Ord. 38, r. 1, applied by Crown Office Rules, r. 5; *R.* v. *Westmoreland Justices* (1746), 1 Wils. 138.

(*j*) *R.* v. *West Riding Justices* (1845), 2 New Sess. Cas. 1.

(*k*) *Anon.* (1682), 2 Mod. Rep. 316.

(*l*) *R.* v. *Malmesbury* (*High Steward*) (1840), 4 Jur. 222.

(*m*) 3 & 4 Will. 4, c. 74, s. 53.

(*n*) *R.* v. *Lunn* (1836), 2 Har. & W. 314; *Crosby* v. *Fortescue* (1836), 5 Dowl. 273.

(*o*) *R.* v. *Simms* (1835), 4 Dowl. 294.

(*p*) Crown Office Rules, r. 65; and see *R.* v. *Peterborough Corporation* (1875), 44 L. J. (Q. B.) 85.

(*q*) Crown Office Rules, r. 6.

(*r*) *R.* v. *Warwickshire Justices* (1836), 5 Dowl. 382; but affidavits produced on showing cause against the rule may or may not be intituled, and all affidavits made after the rule is made absolute must be intituled (*King* v. *Cole* (1796), 6 Term Rep. 640, 642).

(*s*) Crown Office Rules, r. 8; and generally as to affidavits in proceedings on the Crown side, see *ibid.*, rr. 5—11.

(*t*) *R.* v. *Plymouth and Dartmoor Rail. Co., Ex parte Great Western Rail. Co.* (1889), 37 W. R. 334.

Second application.

**222.** When an application for a prerogative writ has been made, argued, and refused on the ground of defects in the case as disclosed in the affidavits supporting the motion, it is not competent for the applicant to make a second application for the same writ on amended affidavits containing fresh materials (*a*). The rule applies even in cases where the defects in the case which caused the refusal of the first application are remedied in the second (*b*), and it makes no difference whether the motion is made in a private capacity or by a law officer on public grounds (*c*). Where, however, the affidavits have merely been wrongly entitled in the first place there may be a second application upon affidavits amended in this respect (*d*).

Service of notice of order *nisi*.

**223.** Notice must be given by the order *nisi* to every person who, by the affidavits on which the order is moved, appears to be interested in or likely to be affected by the proceedings, and to any person who, in the opinion of the court or judge, ought to have such notice (*e*). The order *nisi*, which calls upon the party to whom it is directed to show cause why a writ of mandamus should not issue directing him to do the duty sought to be enforced, is served upon each person to whom notice is given by the order, as well as the party whom the order requires to show cause (*f*).

Unless service is directed to be personal, service at the last known place of abode or business, with a clerk, wife, or servant, or upon such other person, or in such other manner as the court or a judge may direct, shall be deemed to be a sufficient service (*g*). When an order *nisi* is directed to justices in quarter sessions it is sufficient to serve those who heard the original complaint (*h*). In a rule for a mandamus to elect to a corporate office, the office being

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(*a*) *Ex parte Thompson* (1845), 6 Q. B. 721, followed in *R.* v. *Bodmin Corporation*, [1892] 2 Q. B. 21, where it was laid down by DAY, J. (at p. 23), that persons seeking the writ "must come prepared with full and sufficient materials to support their application, and if those materials are incomplete it is quite right that they should not be allowed to come again"; *Levy* v. *Coyle* (1843), 12 L. J. (Q. B.) 294.

(*b*) *Ex parte Thompson, supra; R.* v. *Bodmin Corporation, supra*, in which cases the first application had been refused because there had been no demand or refusal; and the refusal was repeated on a second application although demand and refusal could then be shown to have taken place.

(*c*) *R.* v. *Pickles* (1842), 12 L. J. (Q. B.) 40.

(*d*) *R.* v. *Warwickshire Justices* (1836), 5 Dowl. 382; *R.* v. *Great Western Rail. Co.* (1844), 5 Q. B. 597; *R.* v. *Plymouth and Dartmoor Rail. Co., Ex parte Great Western Rail. Co.* (1889), 37 W. R. 334.

(*e*) Crown Office Rules, r. 50. By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 76 (now repealed by Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49)), there was provision enabling the court to make the rule absolute in the first instance. Where the duty in question was merely ministerial the court frequently so ordered; see *R.* v. *Godolphin (Lord)* (1844), 13 L. J. (M. C.) 57; *R.* v. *Manchester (Churchwardens)* (1839), 7 Dowl. 707. The present practice makes no such provision. Under s. 225 (8) of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), however, a rule for a writ of mandamus to elect a municipal officer may be granted absolute in the first instance (*R.* v. *Wilton Corporation* (1886), 34 W. R. 273); and see pp. 110, 111, *ante*.

(*f*) Crown Office Rules, r. 51.

(*g*) *Ibid.*, r. 128.

(*h*) *R.* v. *Tucker* (1824), 3 B. & C. 544.

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full, the name of the person in possession should be included, and he should be served therewith (*i*).

Alternative commands.

**224.** A rule *nisi* may be granted calling upon a person to show cause why a writ of mandamus should not issue commanding one of two alternatives to be done (*k*).

(ii.) *Showing Cause against the Order Nisi.*

Who may show cause.

**225.** In addition to the party whom the order *nisi* requires to show cause, any person, whether he has had notice or not, who can make it appear to the court or judge that he is affected by the proceeding for a writ of mandamus may show cause against the order *nisi* (*l*). A deputy county court judge may appear and show cause (*m*).

Upon the argument the counsel for the party showing cause begins (*a*).

Affidavits in answer.

**226.** Statements in answer to an order *nisi* must be on affidavit; even when such a statement is made by a revising barrister (*b*). The applicant may, on payment of the usual charges, require the respondent to supply him with copies of any affidavits it is proposed to read upon showing cause (*c*).

Upon leave being obtained from the court or judge either party may make additional affidavits upon any new matter arising out of the affidavits of the opposite party (*d*). Such application cannot, however, be made until the court has so far heard the case as to be able to decide whether there is in fact any new matter to be answered (*e*).

Affidavit by justices.

**227.** Whenever it is a decision of any justice or justices that gives rise to the application for an order *nisi*, the justice or justices may make and file an affidavit setting forth the grounds of the decision so brought under review and any facts which he or they may consider to have a material bearing upon the question at issue, without being required to pay any fee in respect of filing such affidavit or any stamp duty thereon, and such affidavit may be forwarded by post to one of the masters of the court for the purpose of being so filed (*f*). The affidavit must be sworn by the justice or justices (*g*). Affidavits so filed are considered by the court before making the rule absolute against the justice or justices, or otherwise determining the matter so as to set aside the acts or decisions to which the application relates, although no counsel appear on behalf of the justices (*h*).

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(*i*) *R.* v. *Bankes* (1764), 3 Burr. 1452.
(*k*) For an instance, see *R.* v. *London* (*Bishop*) (1889), 23 Q. B. D. 414.
(*l*) Crown Office Rules, r. 52.
(*m*) *R.* v. *Cowper* (1889), 24 Q. B. D. 60.
(*a*) Crown Office Rules, r. 136.
(*b*) *R.* v. *Nepean, Ex parte Jenkins* (1903), 52 W. R. 264; and see p. 109, *ante*.
(*c*) Crown Office Rules, r. 10.
(*d*) *Ibid.*, r. 9.
(*e*) *Hayne* v. *Robertson* (1855), 24 L. J. (C. P.) 155.
(*f*) Review of Justices' Decisions Act, 1872 (35 & 36 Vict. c. 26), s. 2.
(*g*) *R.* v. *Sperling* (1873), 21 W. R. 461, where an affidavit by the person upon whose evidence the decision of the justices was founded was rejected.
(*h*) Review of Justices' Decisions Act, 1872 (35 & 36 Vict. c. 26), s. 3. "All

A magistrate filing an affidavit under the above provisions may also show cause against the order in person (*i*).

When the decision called in question was not unanimous, a dissenting justice is not empowered to make an affidavit under the above provisions, his decision not being called in question (*k*).

No demand.

**228.** The objection that there has been no sufficient demand and refusal must be taken, on cause being shown, before the merits of the case are discussed (*l*).

Collusive applications.

**229.** If it appears that there is no *bonâ fide* contest between the parties, but that they have made use of procedure by way of an order *nisi* for a mandamus for the purpose of obtaining advice from the court, or the court's construction of a statute, the argument will not be allowed to proceed (*m*).

Order absolute.

**230.** If sufficient cause against the issue of the writ is shown, the order *nisi* will be discharged (*n*). If sufficient cause is not shown, the order will be made absolute for the issue of the writ. Also, in doubtful cases, the writ may be allowed to go in order that the matter may be fully argued and determined upon the return to the writ (*o*). The order absolute need not be served (*p*).

When the application is for a mandamus to command the holding of a municipal election (*q*) the respondent may show cause in the first instance against the application; and if sufficient cause is not shown, the court, on proof of due service of notice, statement of grounds of application, and copy of affidavits, may make the rule for a mandamus absolute (*r*).

(iii.) *The Writ.*

Form of writ of mandamus.

**231.** A writ of mandamus must follow the form prescribed (*s*), with such variations as circumstances may require (*t*). It must set forth

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that was intended by the statute was that, instead of the justices being put to the expense of instructing counsel, or being brought up in person, they might make affidavits themselves, and send them by post to the master of the court" (*R.* v. *Sperling* (1873), 21 W. R. 461, *per* COCKBURN, C.J., at p. 462).

(*i*) *R.* v. *Field* (1895), 11 T. L. R. 240, where the court considered that the Act took the case out of the general rule that counsel only could be heard; see p. 111, *ante*.

(*k*) *R.* v. *Waddingham* (1896), 60 J. P. 372.

(*l*) *R.* v. *Eastern Counties Rail. Co.* (1839), 10 Ad. & El. 531.

(*m*) *R.* v. *Blackwall Railway* (*Directors*) (1841), 9 Dowl. 558, *per* Lord DENMAN, C.J.: "When there is a doubt as to the mode of proceeding under an Act of Parliament, the parties must act on their own responsibility, and not come and ask advice from the court, which is not bound to give them directions before the matter is properly ripe for judicial determination."

(*n*) See, for instance, *R.* v. *Middlesex Asylum* (*Visitors*) (1842), 2 Q. B. 433, *per* Lord DENMAN, C.J., at p. 439.

(*o*) *Ibid.*; Com. Dig. tit. Mandamus (A); *R.* v. *London Corporation* (1733), 2 Term Rep. 182, n.

(*p*) Crown Office Rules, r. 53.

(*q*) See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 70, and pp. 80, 81, *ante*.

(*r*) *Ibid.*, s. 225.

(*s*) See Crown Office Rules, Appendix, Form 37. As to the issue of writs from the Crown Office generally, and their preparation, indorsement etc., see *ibid.*, rr. 209—212.

(*t*) *Ibid.*, r. 57.

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the duty to be performed, the facts which show neglect to perform such duty, the facts constituting demand and refusal in respect of the performance of such duty (*a*), the command to perform the duty or (except when the writ is peremptory) to show cause to the contrary, and the command to return the writ.

The writ must also be in strict accordance with the terms of the order absolute. If there is any material difference between order and writ the latter will be quashed (*b*), and permission will not be given to amend the rule so as to support the writ after the mandamus has issued (*c*). Nor will a mandamus be allowed to be made good by supplying its defects from the return (*d*).

Amendment.

Amendment of the writ will, however, be allowed in respect of something which is not material, as the name or title of the person or body to whom the writ is directed (*e*). If, however, the name is wrong altogether the writ will be quashed (*f*).

To whom directed.

Where there is doubt as to whom of several persons the writ should be directed, the choice must be made by the person asking for the writ, and at his peril (*g*). The direction of the writ is material, and must be to those only who are to do the act it commands (*h*); so a writ to one person directing him to command another to do the act in question will be held bad and quashed (*i*).

Such facts must be averred as suffice to show *primâ facie* that a right to the relief requested resides in the applicant. If anything is omitted that is required to perfect the applicant's right, the writ will be bad (*k*).

Joint direction.

**232.** A single writ may be directed to two or more persons for the purpose of enforcing the same duty. Accordingly, as a writ of mandamus to accept a surrender of copyholds cannot issue to the steward alone (*l*), it may be issued to the lord and steward of the manor jointly (*m*). Also, a mandamus may issue to two or more of certain magistrates commanding them to issue distress warrants for levying in respect of unpaid rates (*n*), although the mandamus need not issue against all who refused the warrant (*o*). Where, on the other hand, certain members of a body of magistrates were absent from the proceedings in respect of which a mandamus is asked for, a mandamus will not issue including them; a rule will

(*a*) See p. 101, *ante*.
(*b*) *R.* v. *Water Eaton* (*Lord of the Manor*) (1804), 2 Smith, K. B. 54; *R.* v. *East Lancashire Rail. Co.* (1847), 9 Q. B. 980.
(*c*) *R.* v. *Water Eaton* (*Lord of the Manor*), *supra*.
(*d*) *R.* v. *Hopkins* (1841), 1 Q. B. 161.
(*e*) *R.* v. *Derbyshire, Staffordshire and Worcestershire Junction Rail. Co.* (1854), 23 L. J. (Q. B.) 333.
(*f*) *R.* v. *Ripon Corporation* (1700), 2 Salk. 433.
(*g*) *R.* v. *Wigan Corporation* (1759), 2 Burr. 782.
(*h*) *R.* v. *Hereford Corporation* (1705), 2 Salk. 701.
(*i*) *R.* v. *Derby Corporation* (1707), 2 Salk. 436.
(*k*) *R.* v. *Oxford* (*Bishop*) (1806), 7 East, 345.
(*l*) *R.* v. *Whitford* (*Lord of the Manor*) (1839), 7 Dowl. 709; see title COPYHOLDS, Vol. VIII., pp. 97, 106.
(*m*) *Ibid.*; *R.* v. *Evans* (1839), cited 1 Q. B. 355, n.; *R.* v. *Powell* (1841), 4 Per. & Dav. 719.
(*n*) *R.* v. *Ellis and Greenwood* (1842), 2 Dowl. (N S.) 361.
(*o*) *Ibid.*

only be made absolute in respect of those who took part in such proceedings (*p*).

The mandate.

**233.** It is not necessary that the mandatory part of the writ should prescribe with particularity what is to be done; it may be in general terms (*q*).

The writ must command no more than the party against whom the application is made is legally bound to perform (*r*); and a writ commanding that to be done which by law there is no power to do (*s*), or founded on an obligation which cannot clearly be shown to exist (*t*), cannot be sustained. When a statute requires one of two things to be done, giving the party who is to do the act the option of performing either one or the other, a mandamus will be bad which commands a certain one of the two things to be done, unless it is shown that the party on whom the duty is imposed has rendered it impossible that the other one of the two things should be done (*u*). Where a general duty is imposed a mandamus cannot require it to be done at once (*x*); and, generally, where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way (*y*).

A writ which is bad in respect of one of the matters which it commands to be done cannot be sustained in respect of other things which it also commands. The court will not divide a writ, enforcing one part and not another (*z*).

Peremptory writ.

**234.** In general, the writ commands the duty in question to be done, or cause to the contrary shown in the return to the writ. The court or a judge may, however, if they or he shall think fit, order that any writ of mandamus shall be peremptory in the first instance (*a*). To a peremptory mandamus no return is admissible,

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(*p*) *R.* v. *Wilts Justices* (1840), 8 Dowl. 717.

(*q*) *R.* v. *Southampton Port Commissioners* (1870), L. R. 4 H. L. 449, where it was held that the mandatory part of the mandamus was sufficient in form when it directed "the necessary and legal measures and proceedings for obtaining and recovering" certain sums of money; and that it was not too vague and general, as possibly implying a command to bring an action and as failing to define what the proceedings should be. It was pointed out (*per* Lord HATHERLEY, L.C., at p. 475) that it was for those who were called upon to make their return to the mandamus to state therein any difficulties in the way of doing what was required to be done.

(*r*) *R.* v. *Caledonian Rail. Co.* (1850), 16 Q. B. 19.

(*s*) *R.* v. *Tucker* (1824), 3 B. & C. 544, *per* ABBOTT, C.J., at p. 547.

(*t*) *R.* v. *London and South Western Rail. Co.* (1848), 17 L. J. (Q. B.) 326, where it was held that a mandamus was bad which was founded on the erroneous presumption that the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 92, required a company proposing to take a part of certain property to take the whole.

(*u*) *R.* v. *South Eastern Rail. Co.* (*Directors*) (1853), 4 H. L. Cas. 471.

(*x*) *R.* v. *St. Luke's, Chelsea, Vestry* (1862), 31 L. J. (Q. B.) 50.

(*y*) *R.* v. *Bristol Dock Co.* (1827), 6 B. & C. 181. For form of mandamus, see *Lee District Board* v. *London County Council* (1899), 82 L. T. 306, C. A.

(*z*) *R.* v. *Tithe Commissioners for England and Wales* (1849), 19 L. J. (Q. B.) 177; *R.* v. *London and South Western Rail. Co.*, *supra*.

(*a*) Crown Office Rules, r. 56. A similar provision is made by the Municipal

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but only that of perfect obedience, the person to whom the writ is directed not being given the alternative of showing cause to the contrary (*b*). A mandamus which is peremptory in the first instance is not an appropriate procedure where questions of fact remain in issue (*c*).

Service.

**235.** Unless the court or judge otherwise direct, if the writ of mandamus is directed to one person only the original must be personally served upon such person; but if the writ be directed to more than one person, the original must be shown to each one at the time of service, and a copy served on all but one, and the original delivered to such one (*d*).

When a writ of mandamus is directed to companies, corporations, justices, or public bodies, service must be made, unless the court or judge otherwise direct, upon such and so many persons as are competent to do the act required to be done, the original being delivered to one of such persons, except where by statute service on the clerk or some other officer is made sufficient service (*e*).

Application to quash.

**236.** Application to quash a writ is made by motion for an order *nisi* in the divisional court (*f*).

(iv.) *The Return to the Writ.*

The return.

**237.** A command is included in the writ for a return or answer thereto. The writ may be made returnable forthwith, or time may be allowed, either with or without terms, as the court thinks fit (*g*). The return may state obedience to the writ or some reason for non-compliance, and follows the prescribed form (*h*). If an insufficient reason is returned a second and peremptory mandamus issues to which no return is permitted; strict obedience alone must ensue (*i*).

By whom made.

**238.** The return is made by the party to whom it is directed. When it appears to the court that the respondent claims no right or interest in the subject-matter of the application, or that his functions are merely ministerial, the return to the writ is still made in the name of the person to whom the writ is directed, but, if the court thinks fit so to order, it may be expressed to be made on behalf of the persons really interested therein; in which case the

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Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 225, in the case of a mandamus to proceed to a municipal election.

(*b*) 3 Bl. Com. 111. For the form of a peremptory writ of mandamus, see Crown Office Rules, Appendix, Form No. 37.

(*c*) *Pritchard* v. *Bangor Corporation* (1888), 13 App. Cas. 241, *per* Lord HALSBURY, L.C., at p. 246. For an instance of a rule being made absolute for a peremptory writ in the first instance, there being no facts in dispute, see *R.* v. *Leicester Union*, [1899] 2 Q. B. 632, where the command was to appoint a vaccination officer as required by statute.

(*d*) Crown Office Rules, r. 54.

(*e*) *Ibid.*, r. 55.

(*f*) *Ibid.*, r. 235.

(*g*) *Ibid.*, r. 57. As to where a writ is returnable, see generally, *ibid.*, r. 213.

(*h*) *Ibid.*, Appendix, Form No. 38.

(*i*) 3 Bl. Com. 111.

persons so interested are permitted to frame the return at their own expense (*k*). Apparently the question whether or not the prosecutor would be prejudiced by allowing third parties to come in will weigh with the court when considering whether or not to permit a proceeding which is in the nature of interpleader (*l*). When the return is expressed to be made on behalf of some person other than the person to whom the writ is directed, the proceedings on the writ do not abate by reason of the death, resignation, or removal from office of that person, but may be continued in his name (*m*).

Non-compliance.

**239.** A return showing cause for non-compliance must be very particular and minute (*n*); but it is enough to traverse in the return an allegation contained in the writ in terms which are as particular as the matter that is traversed (*o*). The matter of the return must not be argumentative, but express and direct (*p*); it must also be intelligible, for the court will not interpret an obscure return (*q*).

What constitutes a good return.

**240.** Where a mandamus commands certain things to be done "forthwith," it is a good return to say that a commencement to carry out the command was at once made, and that as much has been done as could be done (*r*). To a mandamus commanding delivery up of books or documents, it is a good return that the party had not possession thereof at the issue of the writ nor since, and he will not be required to state what he did with the documents in question before the issue of the writ (*s*). Where a mandamus commands something to be done in respect of which there is discretion in the person to whom the mandamus is directed, it will

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(*k*) Crown Office Rules, r. 63. By *ibid.*, r. 208, R. S. C., Ord. 57, which relates to interpleader, is made applicable to proceedings by mandamus so far as the nature of the case will admit.

(*l*) *R.* v. *Paynter* (1845), 14 L. J. (M. C.) 182.

(*m*) Crown Office Rules, r. 64; see also *Rochester Corporation* v. *R.* (1858), 27 L. J. (Q. B.) 434, Ex. Ch., *per* MARTIN, B., at p. 436.

(*n*) *R.* v. *Southampton Port Commissioners* (1861), 30 L. J. (Q. B.) 244, *per* CROMPTON, J., at p. 250; approved S. C. (1870), L. R. 4 H. L. 449, *per* BLACKBURN, J., at p. 471; and see *R.* v. *Chester Corporation* (1694), 5 Mod. Rep. 10, where a return to a mandamus to restore a councillor was held bad because it did not state the time of election; *R.* v. *St. Andrew and St. George* (*Governors*) (1839), 10 Ad. & El. 736, where Lord DENMAN, C.J., said at p. 739, "The statement that, for some undisclosed reason, the parties charged with a plain duty refused to perform it because they chose to say, in general terms, that those to whom they are bound are not duly appointed to their office, is wholly insufficient."

(*o*) *R.* v. *Dover Corporation* (1847), 11 Q. B. 277, Ex. Ch., *per* WILDE, C.J., at pp. 287—288.

(*p*) *R.* v. *Hereford Corporation* (1704), 6 Mod. Rep. 309.

(*q*) *R.* v. *Ouse Bank Commissioners* (1835), 3 Ad. & El. 544, *per* Lord DENMAN, C.J., at p. 549. In this case the mandamus commanded the execution of such works "as shall from time to time be deemed necessary, proper, or expedient." The return stated that the commissioners had executed "all such works . . . as should be or were from time to time deemed necessary, proper, or expedient." The return was held insufficient. "If the return had stated that the commissioners thought such and such things necessary, and that they had done them, that would have been a sufficient answer . . . but they have used unintelligible language" (*per* Lord DENMAN, C.J., at p. 549).

(*r*) *R.* v. *Ouse Bank Commissioners*, *supra*, *per* PATTESON, J., at p. 550.

(*s*) *R.* v. *Round* (1835), 4 Ad. & El. 139.

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be a sufficient return that such discretion has been exercised, and reasons for the decision arrived at need not be given (*t*). It will be accounted a good return to a mandamus to restore a party to an office, if it appear therefrom that there was good ground for the removal, and that the only result of ordering the restoration to office would apparently be his removal again in a more formal manner, although the mode of removal in the first instance may be open to objection (*a*). A return to a mandamus to restore to a freehold office, however, will not be good unless it shows that the removal was preceded by an inquiry in which the person removed had an opportunity of being heard (*b*). It is otherwise in respect of an office held during pleasure (*c*).

Several causes may be returned to a mandamus provided they are not inconsistent (*d*); and, if any one of them is sufficient, no peremptory mandamus will be awarded (*e*). Where inconsistent causes are returned the whole return will be quashed (*f*).

The court may order any return to a writ of mandamus to be quashed on the ground that it is frivolous or vexatious (*g*); but a return is not a pleading which can be struck out on that or any other ground (*h*).

(v.) *Proceedings upon the Return.*

Pleading to the return.

**241.** The applicant for the writ of mandamus may plead to the return thereto within such time and in like manner as if the return were a statement of defence delivered in an action. This pleading and all subsequent proceedings, including pleadings, trial, judgment and execution, proceed and may be had and taken as if in an action (*i*); but the documents are still filed at the Crown Office (*k*).

The parties may concur in stating any question of law in the form of a special case for the opinion of the court, or the court or a judge may order a case to be so stated (*l*).

A point of law may be raised in answer to a return or other pleading, and such point of law may be disposed of by the judge who tries the matter at or after the trial, or it may be set down for hearing before the trial. If there is no question of fact to be

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(*t*) *R.* v. *London Corporation* (1832), 3 B. & Ad. 255.

(*a*) *R.* v. *Griffiths* (1822), 5 B. & Ald. 731; *R.* v. *Bristol Corporation* (1822), 1 Dow. & Ry. (K. B.) 389.

(*b*) *R.* v. *Smith* (1844), 5 Q. B. 614.

(*c*) *R.* v. *Darlington School (Governors)* (1844), 6 Q. B. 682.

(*d*) *Wright* v. *Fawcett* (1767), 4 Burr. 2041; *R.* v. *London Corporation, supra, per* PARKE, J., at pp. 271, 272.

(*e*) *R.* v. *London Corporation, supra, per* PARKE, J., at p. 272.

(*f*) *R.* v. *Cambridge Corporation* (1788), 2 Term Rep. 456.

(*g*) Crown Office Rules, r. 59. Previously the court had exercised discretionary power to quash the return on motion; see *R.* v. *St. Katharine Dock Co.* (1832), 4 B. & Ad. 360.

(*h*) Under R. S. C., Ord. 25, r. 4 (*R.* v. *Cheshunt Local Board*, [1884] W. N. 78).

(*i*) Crown Office Rules, r. 125. Such procedure is, however, subject to the Crown Office Rules generally (*ibid.*); see title PRACTICE AND PROCEDURE.

(*k*) See Crown Office Rules, r. 127. For the title of proceedings subsequent to the return, see *ibid.*, Appendix, Form No. 124. For the form of a subpœna on the trial of an issue on mandamus, see *ibid.*, Form No. 156.

(*l*) See R. S. C., Ord. 34 (special case), applied to civil proceedings on the Crown side by Crown Office Rules, r. 129.

decided the court gives judgment, on the argument of the point of law, without any motion for judgment being necessary (*m*).

Right to begin.

**242.** Upon the argument of a case where the court has granted an order *nisi*, the counsel for the party showing cause begins (*n*); otherwise the party impugning the return begins, even though his opponent proposes to object to the form of the mandamus itself (*o*).

Objections.

**243.** Objection to the validity of the writ itself may be taken at any stage of the proceedings (*p*). The sufficiency of the writ may therefore be called in question subsequently to the return (*q*) or even upon a motion for attachment for disobedience to a peremptory writ (*r*).

Pleading to return of unconditional compliance.

**244.** It is allowable to plead to a return of unconditional compliance with the writ, provided it is not a peremptory writ, and such a return can be tried by a proceeding thereon without resort being had to a separate action (*s*). In answer to a return of unconditional compliance with a mandamus to justices to hear and determine a matter, it may be pleaded that the justices declined to exercise a jurisdiction which they possessed, but professed to exercise a jurisdiction which they did not possess (*t*), but a plea that they had determined the matter wrongly would be bad (*a*).

Peremptory writ.

**245.** When a return to a writ of mandamus has been quashed (*b*), or where the applicant obtains judgment upon the argument of a point of law raised in answer to a return or other pleading (*c*) or after pleading to the return (*d*), the applicant is entitled forthwith to a peremptory writ of mandamus to enforce the command contained in the original writ (*e*).

When respondent claims no interest.

**246.** When it appears to the court that the respondent claims no right or interest in the subject-matter of the application, or that his functions are merely ministerial, all proceedings from the return down to judgment proceed in the name of the person to whom the writ is directed, but if the court so orders, may be expressed to be made on behalf of the parties really interested, and such parties may conduct such proceedings at their expense (*f*). If, in such a case, judgment is given for or against the applicant it is likewise

(*m*) Crown Office Rules, r. 60, and R. S. C., Ord. 25, r. 2.
(*n*) Crown Office Rules, r. 136.
(*o*) *R.* v. *St. Pancras Church Trustees* (1837), 6 Ad. & El. 314.
(*p*) *Clarke* v. *Leicestershire and Northamptonshire Canal Co.* (1845), 6 Q. B. 898, at p. 903, Ex. Ch.
(*q*) *R.* v. *Margate Pier Co.* (1819), 3 B. & Ald. 220; *London Corporation* v. *R.* (1848), 13 Q. B. 30, at p. 41, Ex. Ch.
(*r*) *R.* v. *Ledgard* (1841), 1 Q. B. 616.
(*s*) *R.* v. *Pirehill North Justices* (1884), 14 Q. B. D. 13, C. A., where the plea traversed the alleged compliance with the mandamus.
(*t*) *R.* v. *King* (1888), 20 Q. B. D. 430, C. A.
(*a*) *Ibid.*, *per* LOPES, L.J., at p. 441.
(*b*) Crown Office Rules, r. 59.
(*c*) See *ibid.*, r. 60, and p. 120, *ante*.
(*d*) See *ibid.*, r. 125, and p. 120, *ante*.
(*e*) *Ibid.*, r. 61. For the form of a peremptory writ, see *ibid.*, Appendix, Form No. 37.
(*f*) *Ibid.*, r. 63.

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given for or against the persons on whose behalf the return is expressed to be made; and if judgment is given for them, they have the same remedies for enforcing it as the person to whom the writ is directed would have in other cases (*g*). Where the return is thus expressed to be made on behalf of some person other than the person to whom the writ is directed, and such person dies, resigns, or is removed from office, the peremptory writ is directed to the successor in office or right of that person (*h*).

Peremptory mandamus.

**247.** The grant of a peremptory mandamus is a matter for the discretion of the court (*i*). It will not be awarded until the proceedings on the first mandamus are complete, so that the whole record can come before the court (*k*).

A peremptory writ always issues in the same terms as the original writ, except that it includes the word "peremptorily" and omits the alternative of showing cause against compliance (*l*). The original writ is enforceable in the terms in which it was issued or not at all (*m*). Nor will the form of the writ be altered to suit what, upon the return, may be considered the justice of the case (*n*).

If there is a mandamus commanding several things, the prosecutor must show that he is entitled to the whole. If the claim for one of them fails a peremptory mandamus cannot go (*o*).

A return to a peremptory writ will not be permitted to be argued, for no return to a peremptory mandamus is receivable (*p*). Absolute obedience is the only answer (*q*). Any return required to be made must be made to the first writ (*r*).

Application of Rules of Supreme Court.

**248.** The Rules of the Supreme Court relating to amendment (*s*), execution (*t*), time (*a*), notices (*b*), and effect of non-compliance (*c*),

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(*g*) Crown Office Rules, r. 63.

(*h*) *Ibid.*, r. 64.

(*i*) *R.* v. *Griffiths* (1822), 5 B. & Ald. 731, where the mandamus was to restore a party to office, and the return was defective in form. Nevertheless since "if we were to make an order for restoring the defendant to his office, it would be the duty of the corporation to remove him again in a more formal manner, for his preceding neglect of duty," it was held that the discretion vested in the court would be best exercised by refusing a peremptory mandamus (*ibid.*, *per* BAYLEY, J., at p. 736).

(*k*) *R.* v. *Baldwin* (1838), 8 Ad. & El. 947.

(*l*) *R.* v. *Tithe Commissioners for England and Wales* (1849), 19 L. J. (Q. B.) 177, at p. 184; *London Corporation* v. *R.* (1848), 13 Q. B. 30, 41, Ex. Ch.

(*m*) *R.* v. *St. Pancras New Church* (*Trustees*) (1835), 5 Nev. & M. (K. B.) 219, *per* Lord DENMAN, C.J., at p. 228.

(*n*) *Local Government Board for Ireland* v. *R.*, [1903] A. C. 402, *per* Lord HALSBURY, L.C., at p. 405.

(*o*) *R.* v. *East and West India Docks and Birmingham Junction Rail. Co.* (1853), 22 L. J. (Q. B.) 380.

(*p*) *R.* v. *Ledgard* (1841), 1 Q. B. 616; *R.* v. *Poole Corporation* (1841), 1 Gal. & Dav. 728; *R.* v. *Hudson* (1845), 9 Jur. 345.

(*q*) 3 Bl. Com. 111.

(*r*) Crown Office Rules, r. 58.

(*s*) R. S. C., Ord. 28, applied by Crown Office Rules, r. 260.

(*t*) R. S. C., Ord. 42 and Ord. 48a, r. 8, applied by Crown Office Rules, r. 207.

(*a*) R. S. C., Ord. 64, applied by Crown Office Rules, r. 259.

(*b*) R. S. C., Ord. 66, applied by Crown Office Rules, r. 263.

(*c*) R. S. C., Ord. 70, applied by Crown Office Rules, r. 264.

apply to civil proceedings on the Crown side, so far as they are applicable.

(vi.) *The Enforcement of Obedience.*

Attachment.

**249.** If a person to whom a writ of mandamus has been directed makes no return thereto as ordered (*d*), or fails to comply with a peremptory writ (*e*), or makes a return to a peremptory writ (*f*), he is punishable for his contempt by attachment (*g*).

It remains open to the respondent, when showing cause why attachment should not issue, to take exception to the writ of mandamus itself; and if he can show that the mandamus is bad no writ of attachment can go (*h*).

Attachment cannot issue against a corporation as a body for disobedience to a writ of mandamus ordering the doing of a corporate act. The particular individuals guilty of disobedience must be named in the rule for attachment (*i*).

Attachment for not making a return will, in general, issue upon an affidavit of personal service of the writ (*k*). In the absence of personal service of the writ, attachment will not, in general, issue unless there has first been applied for and granted an order to compel the return of the writ (*l*).

Order for performance by some other person.

**250.** If a mandamus be not complied with, the court or a judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the mandamus has been obtained, or some other person appointed by the court or judge, at the cost of the disobedient party, and, upon the act being done, the expense incurred may be ascertained in such manner as the court or a judge may direct, and execution may issue for the amount so ascertained and costs (*m*).

Protection to person obeying writ.

No action or proceeding may be commenced or prosecuted against any person in respect of anything done in obedience to a writ of mandamus issued by the Supreme Court or any judge thereof (*n*).

(vii.) *Appeal.*

Appeal.

**251.** The decisions of the Crown side of the King's Bench Division are subject to review by the Court of Appeal (*o*). The

(*d*) 3 Bl. Com. 111; *R.* v. *Poole Corporation* (1841), 1 Gal. & Dav. 728.
(*e*) *R.* v. *Severn and Wye Rail. Co.* (1819), 2 B. & Ald. 646, *per* BEST, J., at p. 652.
(*f*) Crown Office Rules, r. 59; *R.* v. *Poole Corporation, supra.*
(*g*) An application for a writ of attachment for contempt is made by way of motion for an order *nisi*; see Crown Office Rules, rr. 240—242. As to attachment, see title CONTEMPT OF COURT, Vol. VII., pp. 307 *et seq.*
(*h*) *R.* v. *Ledgard* (1841), 1 Q.B. 616, 622.
(*i*) *R.* v. *Poole Corporation, supra*; and see *R.* v. *Worcester Corporation* (1903), 68 J. P. 130; (1905) 69 J. P. 296.
(*k*) For form of affidavit of service, see Crown Office Rules, Appendix, Form No. 202.
(*l*) See Crown Office Rules, r. 214; *Coventry Corporation's Case* (1698), 2 Salk. 429.
(*m*) R. S. C., Ord. 42, r. 30.
(*n*) Crown Office Rules, r. 62, founded on 6 & 7 Vict. c. 67, s. 3, now repealed.
(*o*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19.

SECT. 4. **Mandamus.**

Rules of the Supreme Court as to appeals to the Court of Appeal apply to all civil proceedings on the Crown side, including mandamus (*p*). An appeal further lies from the Court of Appeal to the House of Lords (*q*).

Criminal matters.

**252.** There is no appeal from the High Court in any criminal cause or matter (*r*). An application to a magistrate for a summons against a company under the Companies Act, 1862 (*s*), for default in forwarding a list of members to the Registrar of Joint Stock Companies (*t*), and proceedings to compel a magistrate to state a case in respect of an order by him in a criminal matter (*a*), are criminal causes or matters in respect of which there is no appeal from the King's Bench Division.

The decision of the King's Bench Division as to an application for a mandamus to commissioners appointed to inquire into alleged corrupt practices at a parliamentary election directing them to grant a certificate protecting a witness from criminal proceedings for bribery (*b*) is not a criminal cause or matter excluding appeal (*c*).

Discretion of court.

**253.** The exercise of the discretion of the court as to the grant of a mandamus may be the subject of appeal, but the Court of Appeal requires to be satisfied that such discretion has been wrongly exercised before it will overrule such a decision on appeal (*d*). The grant of a peremptory writ of mandamus is a determination of a right according to the merits of the case, and not the determination of a matter of discretion, and is subject to review as if it were a decision in an action (*e*).

Miscellaneous.

**254.** An appeal will lie in respect of a decision of the King's Bench Division upon an application for an order in the nature of a mandamus, as to a county court judge (*f*), or a revising barrister (*g*), to state a case.

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(*p*) R. S. C., Ord. 58, applied by Crown Office Rules, r. 206.

(*q*) Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 3.

(*r*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47.

(*s*) 25 & 26 Vict. c. 89, ss. 26, 27. Now repealed and re-enacted by Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 26.

(*t*) *R.* v. *Tyler and International Commercial Co.*, [1891] 2 Q. B. 588, C. A., where the appeal was from the judgment of the Queen's Bench Division discharging a rule *nisi* for a mandamus directing a magistrate to hear and determine an application for a summons.

(*a*) *Ex parte Schofield*, [1891] 2 Q. B. 428, C. A., where the application to the Queen's Bench Division had been for an order *nisi* for a mandamus to compel a magistrate to state a case in respect of an order made by him for the abatement of a smoke nuisance under the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 96.

(*b*) See Corrupt Practices Prevention Act, 1863 (26 & 27 Vict. c. 29), s. 7. This Act has been repealed except as to s. 6, and replaced by Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51).

(*c*) *R.* v. *Holl* (1881), 7 Q. B. D. 575, C. A.

(*d*) *R.* v. *Maidenhead Corporation* (1882), 9 Q. B. D. 494, C. A., *per* JESSEL, M.R., at p. 503.

(*e*) *R.* v. *All Saints, Wigan (Churchwardens)* (1876), 1 App. Cas. 611.

(*f*) *Clarke* v. *Roche* (1877), 36 L. T. 727.

(*g*) *R.* v. *Bell, Ex parte Kent* (1908), 24 T. L. R. 266, C. A.

General rule as to costs.

**255.** The Rules of the Supreme Court as to costs apply, as far as they are applicable, to all civil proceedings on the Crown side. Costs are, therefore, matters for the discretion of the court or judge (*h*).

The general rule which the court will follow is that costs will be given to the successful party, unless the circumstances of the case show special reasons why costs should not follow the event (*i*).

Accordingly, a respondent who successfully shows cause why a mandamus should not issue will get his costs (*k*); and the rule extends to all respondents considered by the court to be parties who are bound to appear by reason of their having an interest in the dispute (*l*), so that not only the licensing justices, but also successful objectors before them, may be awarded costs upon the discharge of a rule *nisi* calling upon justices to show cause why they should not hear an appeal in respect of an application for a licence (*m*).

Similarly a party who unsuccessfully opposes the issue of a writ of mandamus will have to bear the costs (*n*); and the rule applies to parties who succeed upon an objection in the court below, which subsequently turns out to be ill-founded, and who unsuccessfully oppose the issue of a mandamus to correct the error (*o*). The rule, however, would not be applicable in the case of a party who, having succeeded in the court below upon an erroneous decision, yet does not oppose the correctness of the error by appearing to show cause against the issue of a mandamus (*p*), unless he substantially litigates the rule up to the time of cause being shown (*q*).

Special circumstances.

**256.** It will be held a special circumstance, justifying departure from the rule that costs follow the event, where the matter in question was wrongly decided by the court below, uninfluenced by any improper objection by the party in whose favour the decision

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(*h*) See R. S. C., Ord. 65, applied by Crown Office Rules, r. 261.

(*i*) *R.* v. *Newbury Corporation* (1841), 1 Q. B. 751; *R.* v. *Great Yarmouth Justices* (1855), 1 Jur. (N. S.) 476; *R.* v. *Harding* (1890), 6 T. L. R. 175.

(*k*) *R.* v. *Bridgnorth Corporation* (1839), 10 Ad. & El. 66, where it was laid down by Lord DENMAN, C.J., at p. 70, that "where a person is bound by law to pronounce a decision, and that decision is disputed before us, and proves to be right, he is entitled to costs."

(*l*) *R.* v. *West Riding of Yorkshire Justices, Ex parte Shaw*, [1898] 1 Q. B. 503, at p. 512.

(*m*) *Ibid., per* KENNEDY, J., at p. 512: "It was suggested on behalf of the unsuccessful applicant that, in view of the recent decision in the House of Lords of *Boulter* v. *Kent Justices*, ([1897] A. C. 556), we had no jurisdiction to give costs to that party who was the objector before the licensing justices. We have considered whether or not there has been introduced, by reason of that decision, a bar to our granting costs in such a case to a successful respondent, and we are of opinion that there is no such bar."

(*n*) *R.* v. *Cumberland Justices*, *R.* v. *Lancashire Justices* (1848), 17 L. J. (M. C.) 133; *R.* v. *Wilts and Berks Canal Navigation* (1874), 30 L. T. 498.

(*o*) *R.* v. *Cumberland Justices*, *R.* v. *Lancashire Justices, supra;* followed in *R.* v. *Surrey Justices* (1850), 19 L. J. (M. C.) 171. See also *R.* v. *Surrey Justices* (1846), 9 Q. B. 37.

(*p*) *R.* v. *Cumberland Justices*, *R.* v. *Lancashire Justices, supra; R.* v. *Surrey Justices* (1850), *supra.*

(*q*) *R.* v. *Birmingham Union* (1874), 44 L. J. (M. C.) 48.

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was given (*r*); or where the objector in the court below was entitled to succeed according to the law as it was then understood, but the point first receives judicial construction upon the application for the mandamus (*s*). And where it appears doubtful whether the successful applicant for a mandamus was entitled to succeed, upon the facts existing at the time of his original application to the body against whom the writ, upon facts subsequently existing, afterwards issued, he will generally not be regarded as a successful party within the rule (*t*). Also, where the necessity of the mandamus was occasioned by the default of the successful applicants for the writ the latter will be required to pay the costs (*a*). It is also a case for the exercise of the discretion of the court not to give costs to the successful party when the mandamus issues against a person who has done all he could to act in a right and proper manner in the discharge of a public duty (*b*).

Where defendants succeed in their return to the writ upon a point which might have been raised on showing cause, so that the prosecutors were misled into continuing the proceedings, such prosecutors may be required to pay only the costs of the return and proceedings subsequent thereto (*c*).

The rule that a party who unsuccessfully opposes an application for a mandamus must pay the costs applies to a party who shows cause in the first instance (*d*).

Crown.

**257.** The ancient common law doctrine that the Crown neither pays nor receives costs applies to proceedings concerned with the prerogative writ of mandamus (*e*).

Municipal election.

**258.** Where a mandamus to hold a municipal election (*f*) is issued with the consent of the local authority against whom the writ goes, the applicant may be given his costs, and the local authority may consent to the payment of such costs (*g*). The order may be drawn up in such a manner as to prevent any individual member of the local authority in question being personally liable (*h*).

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(*r*) *R.* v. *Cheshire Justices* (1848), 5 Dow. & L. 426; *R.* v. *Middlesex* (*Sheriff*) (1843), 5 Q. B. 365.

(*s*) *R.* v. *Harden* (1854), 23 L. J. (Q. B.) 127; see also *R.* v. *Hull and Selby Rail. Co.* (1844), 13 L. J. (Q. B.) 257.

(*t*) *R.* v. *Langridge* (1855), 24 L. J. (Q. B.) 73.

(*a*) *R.* v. *Burleigh Board of Health* (1859), 1 L. T. 92, where the applicants had been plaintiffs in a successful action against the board and did not sign judgment until after two years, so making it necessary for the board to refuse to levy a rate for payment until they had the authority of the court to justify them in so doing.

(*b*) *R.* v. *Cox* (1884), 48 J. P. 440; *R.* v. *Harding* (1890), 6 T. L. R. 175.

(*c*) *R.* v. *St. Pancras* (*Churchwardens*) (1843), 2 Dowl. (N. S.) 955.

(*d*) *R.* v. *Derby Recorder* (1851), 2 L. M. & P. 292.

(*e*) *R.* v. *Canterbury* (*Archbishop*), [1902] 2 K. B. 503, 572; and [1903] 1 K. B. 289, C. A., *per* COLLINS, M.R., at p. 292.

(*f*) See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 70, 225; and pp. 80, 81, *ante*.

(*g*) *Re Stratford-on-Avon Corporation* (1886), 2 T. L. R. 431; *R.* v. *Cambridge Corporation* (1845), 4 Q. B. 801.

(*h*) *R.* v. *St. Saviour's, Southwark* (1838), 7 Ad. & El. 925.

Person showing cause.

**259.** A person who shows cause against an order *nisi* or summons on the ground that he is affected by the proceedings for the writ is liable to costs in the discretion of the court or judge if the order is made absolute or the prosecutor obtains judgment (*i*).

Order in nature of mandamus.

**260.** An order in the nature of a mandamus to justices (*k*), to a county court judge (*l*), to a revising barrister (*m*), or to a coroner (*n*), may be issued with or without costs as to the court may seem fit. An arbitrator may be ordered by the court or a judge to state a case on such terms as to costs as seems just to the authority making the order (*o*).

Order absolute.

**261.** The costs of service of an order absolute may be allowed in the discretion of the taxing officer, where the writ is not issued (*p*).

Generally, costs will not be given upon making a rule absolute for a mandamus. A separate application must be made for such costs (*q*).

Application for costs.

**262.** Every application for the costs of a mandamus must, unless the court or a judge orders otherwise, be made before the fifth day of the sittings next after that in which the right to make such application accrued, and shall be upon notice of motion to be served two days before the day named therein for moving, and shall be brought on as if it were an *ex parte* motion, and not be put into the Crown paper (*r*). The party moving for costs must leave at the Crown Office a notice for the production in court of all the affidavits filed in support of, and in opposition to, the original order (*s*). No affidavit is necessary showing a previous demand upon the party for the costs (*t*).

Where it appears, upon making a rule absolute for a mandamus, that the litigation is, in fact, at an end, the costs may be given as part of the rule (*a*). The mere fact that cause is not shown against the rule does not imply the termination of the litigation (*b*). Where a mandamus issues to a local authority to hold a municipal election (*c*), the local authority having consented to the application, costs may be given to the applicant when

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(*i*) Crown Office Rules, r. 52.

(*k*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 5; and see p. 106, *ante*.

(*l*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 131; and see p. 107, *ante*.

(*m*) Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 37; and see p. 109, *ante*.

(*n*) Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 6; and see p. 108, *ante*.

(*o*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 20; and see p. 109, *ante*.

(*p*) Crown Office Rules, r. 53.

(*q*) *R.* v. *Brighton and South Coast Rail. Co.* (1864), 10 L. T. 496.

(*r*) Crown Office Rules, r. 66.

(*s*) *Ibid.*, r. 67.

(*t*) *R.* v. *Cheshire Justices* (1848), 5 Dow. & L. 426.

(*a*) *R.* v. *East Anglian Rail. Co.* (1853), 2 E. & B. 475; *R.* v. *Thames and Isis Navigation Commissioners* (1839), cited 8 Ad. & El. 901, n.; *R.* v. *Brighton and South Coast Rail. Co.*, *supra*.

(*b*) *R.* v. *East Anglian Rail. Co.*, *supra*.

(*c*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 70; and Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75. See also p. 126, *ante*.

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granting the application for the writ, although notice that costs would then be applied for has not been given to such local authority (*d*).

When a writ of mandamus has issued, and there has subsequently been a trial of the issues arising upon the return, the costs of the writ may be included in the costs of the trial, so that a separate application for such costs is not necessary (*e*).

When it has been returned to a writ of mandamus that the functionaries to whom it was directed are no longer in office, it is no reason why the writ should not go so as to entitle the prosecutor to his costs (*f*).

Security for costs.

**263.** When an order for a mandamus has been made absolute, the court will not order a prosecutor who has an interest to try in the matter to give security for costs, or stay the proceedings, on the ground of his poverty, or on the ground that other persons have induced him to apply for the writ (*g*).

## SECT. 5.—*Quo Warranto.*

### SUB-SECT. 1.—*Nature and Purpose.*

Nature.

**264.** An information in the nature of a *quo warranto* is the modern form of the obsolete writ of *quo warranto* which lay against a person who claimed or usurped an office, franchise, or liberty, to inquire by what authority he supported his claim, in order that the right to the office or franchise might be determined. It also lay in cases of non-user, abuse, or long neglect of a franchise (*a*). Although in form a criminal proceeding, an information in the nature of a *quo warranto* has long been applied to the mere purpose of trying the civil right to the office or franchise (*b*); and now it is provided by statute that proceedings in *quo warranto* shall be deemed to be civil proceedings whether for purposes of appeal or otherwise (*c*).

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(*d*) *Re West Sussex County Council, Ex parte Henderson* (1895), 65 L. J. (Q. B.) 184.

(*e*) *R.* v. *Fall* (1841), 1 Q. B. 636.

(*f*) *R.* v. *Allen* (1872), L. R. 8 Q. B. 69, *per* BLACKBURN, J., at p. 76.

(*g*) *R.* v. *Malmesbury Corporation* (1841), 9 Dowl. 359.

(*a*) 3 Bl. Com. 262; 2 Co. Inst. 282. It is for the purpose of trying the right to corporate offices, that *quo warranto* proceedings have usually been resorted to in modern times. For an instance of *quo warranto* proceedings on account of the abuse of a franchise, see *R.* v. *Hertford Corporation* (1699), 1 Salk. 374, where the defendant was required to show by what authority he had admitted persons to be freemen of the corporation who were not inhabitants of the borough; and see *Peter* v. *Kendal* (1827), 6 B. & C. 703, at p. 710. In *R.* v. *Bridge* (1749), 1 Wm. Bl. 46, there were *quo warranto* proceedings in respect of holding a court leet after long disuse.

(*b*) The *quo warranto* information retained its criminal aspect for some time after it had superseded the writ, inasmuch as, in addition to trying the civil right, seizing the franchise, or ousting the wrongful possessor, there was a fine, although it was only nominal (3 Bl. Com. 263). For the contents of a modern information in the nature of a *quo warranto*, see Crown Office Rules, 1906, Appendix, Form No. 32; Encyclopædia of Local Government Law, Vol. V., pp. 307, 308.

(*c*) Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 15.

SUB-SECT. 2.—*When Quo Warranto will and will not lie.*

Essential conditions.

**265.** An information in the nature of a *quo warranto* will only lie (*d*) in respect of any particular office when that office satisfies the following conditions:—

Creation of office.

The office must have been created by charter from the Crown or by statute (*e*). Thus, an information will not lie in respect of the office of churchwarden, for there can be, in such a case, no usurpation of any right of the Crown (*f*), nor against an officer of a private corporation which exercises no franchise or authority under the Crown (*g*), nor against a clerk to a body of land tax commissioners, because his post is not a corporate office (*h*).

Duties must be public.

The duties of the office must be of a public nature (*i*). Thus, an information will not lie in respect of the post of treasurer to a district council which acts as rural sanitary authority pursuant to the Local Government Act, 1894 (*k*), because the duties of such an office are not of that public and substantive nature required to support a *quo warranto* (*l*).

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(*d*) As to when mandamus and not *quo warranto* is the proper remedy for trying the right to a corporate office, see title CORPORATIONS, Vol. VIII., pp. 326, 333; and pp. 79 *et seq.*, *ante*.

(*e*) *Darley* v. *R.* (1846), 12 Cl. & Fin. 520, H. L. Hitherto it had been thought that the remedy by *quo warranto* was confined to cases of usurpation upon the Crown directly. In this case, however, it was considered that an office created by statute was created by the Crown in a sufficient sense for an information to lie. Certain earlier cases on the point are accordingly no longer of any authority, as, for instance, *R.* v. *Ramsden* (1835), 3 Ad. & El. 456; *Re Aston Union* (1837), 6 Ad. & El. 784, cases where an information was refused in respect of the office of guardian of the poor, whereon now see *R.* v. *Hampton* (1865), 6 B. & S. 923; and *R.* v. *Rawlins* (1884), 14 Q. B. D. 325, where the office of poor law guardian was held to be a proper subject for an information. If the office is created by statute the sanction of Parliament may be either mediate, as where commissioners or some other body are empowered by statute to create the office, or immediate (*R.* v. *St. Martin's-in-the-Fields Guardians* (1851), 17 Q. B. 149).

(*f*) *R.* v. *Shepherd* (1791), 4 Term Rep. 381; and such office is not affected by the decision in *Darley* v. *R.*, *supra* (*Re Barlow* (1861), 30 L. J. (Q. B.) 271).

(*g*) *R.* v. *Bedford Level Corporation* (1805), 6 East, 356, where the office in question was that of registrar to such a corporation.

(*h*) *R.* v. *Thatcher* (1822), 1 Dow. & Ry. (K. B.) 426.

(*i*) *R.* v. *St. Martin's-in-the-Fields Guardians*, *supra*, *per* Lord CAMPBELL, C.J., at p. 160: "Is the office of a public nature? We must look to the functions, and compare them with those which were held to constitute such an office in *Darley* v. *R.*, *supra*. The House of Lords laid down no criterion in that case; but they held that the office there in question was public within the rule they laid down."

(*k*) 56 & 57 Vict. c. 73.

(*l*) *R.* v. *Wells* (1895), 43 W. R. 576. An information in the nature of a *quo warranto* has also been held to lie in respect of the following offices:—Vestryman elected under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), on the ground that it was an office created by statute (*R.* v. *Soutter*, [1891] 1 Q. B. 57, C. A.), and on the same grounds it would appear to lie in respect of the office of metropolitan borough councillor, which replaced the office of vestryman (London Government Act, 1899 (62 & 63 Vict. c. 14); see title METROPOLIS); guardian of the poor elected under the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76) (*R.* v. *Hampton* (1865), 6 B. & S. 923); clerk to a board of guardians elected by the board under an order of the Poor Law Commissioners (now the Local Government Board) pursuant to the Poor Law Amendment Act,

SECT. 5. Quo Warranto.

Tenure must be permanent.

The office must be one the tenure of which is permanent, the word "permanent" being here used in contradistinction to removable at pleasure (*m*), or, in other words, the holder of the office must be an independent official, not one discharging the functions of a deputy or servant, or holding at the will and pleasure of others (*n*). Want of permanency in this sense will lead to the refusal of an information in respect of the post of clerk to borough justices, for the clerk holds his office at the pleasure of the justices,

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1834 (4 & 5 Will. 4, c. 76) (*R.* v. *St. Martin's-in-the Fields Guardians* (1851), 17 Q. B. 149), for the office is held mediately, although not immediately, from the Crown (Vestries Act, 1850 (13 & 14 Vict. c. 57), see also *R.* v. *Griffiths* (1851), 17 Q. B. 164); county treasurer in Ireland (*Darley* v. *R.* (1846), 12 Cl. & Fin. 520, H. L., where the ground of the decision was that the public had an interest in the distribution of a fund, and that the officer distributing it was therefore performing duties of a public nature, and compare *R.* v. *Herefordshire Justices* (1819), 1 Chit. 700); the official of a court leet (*R.* v. *Aythrop* (1757), 2 Keny. 17); and, apparently, superintendent registrar of births, marriages, and deaths (in *Ex parte Parry* (1887), 3 T. L. R. 649, it was held that an information would not lie in such a case, but in *R.* v. *Burrows*, [1892] 1 Q. B. 399, A. L. SMITH, J., referred to that as "an unfortunate decision," and held the case to be of no authority. In *R.* v. *Carroll* (1888), 22 L. R. Ir. 400, however, *Ex parte Parry*, *supra*, was followed. In *R. v. Acason* (1862), 8 Jur. (N. S.) 841, an information was granted in respect of this office, but the point whether or not such an information would lie was not discussed).

The following (*inter alia*) are offices in respect of which there have been *quo warranto* proceedings, although the question whether or not an information in the nature of a *quo warranto* would lie was not discussed in some of them:—Recorder of a borough (*R.* v. *Colchester Corporation* (1788), 2 Term Rep. 259); freeman of a borough (*R.* v. *Pepper* (1838), 7 Ad. & El. 745); burgess (*R.* v. *Tate* (1803), 4 East, 337; *R.* v. *Trelawney* (1765), 3 Burr. 1615; *Seale* v. *R.* (1857), 8 E. & B. 22, Ex. Ch.); bailiff of a borough (*R.* v. *Sargent* (1793), 5 Term Rep. 466); constable (*R.* v. *Wallis* (1793), 5 Term Rep. 375); mayor (*R.* v. *Dixon* (1850), 15 Q. B. 33); alderman (*R.* v. *Bradley* (1861), 3 E. & E. 634; see also *R.* v. *Morton*, [1892] 1 Q. B. 39); town councillor (*R.* v. *Ireland* (1868), L. R. 3 Q. B. 130; *R.* v. *Beer*, [1903] 2 K. B. 693); coroner of a borough (*R.* v. *Taylor* (1840), 11 Ad. & El. 949; *R.* v. *Grimshaw* (1847), 10 Q. B. 747); coroner of a county (*R.* v. *Diplock* (1868), 10 B. & S. 174, n.); deputy returning officer at election of guardians (*R.* v. *Carter* (1904), 68 J. P. 466); governor of a borough gaol (*R.* v. *Lancaster* (1847), 10 Q. B. 962); alderman and justice of the peace (*R.* v. *Patteson* (1832), 4 B. & Ad. 9); justice of the peace for a manor (*R.* v. *Mashiter* (1837), 6 Ad. & El. 153); sheriff (*R.* v. *Whitwell* (1792), 5 Term Rep. 85); chief constable (*R.* v. *Watkinson* (1839), 10 Ad. & El. 288); clerk of the peace (*R.* v. *Russell* (1869), 10 B. & S. 91); judge of a county court (*R.* v. *Parham* (1849), 13 Q. B. 858); high bailiff of a county court (*R.* v. *Dyer* (1849), 13 Q. B. 851); master of a City Company (*R.* v. *Attwood* (1833), 4 B. & Ad. 481; *R.* v. *Bumstead* (1831), 2 B. & Ad. 699); member of the General Council of Medical Education (*R.* v. *Storrar* (1859), 2 E. & E. 133. See also Comyns' Digest, 5th ed. (1822), Vol. VII., pp. 192—195, for a list of cases in which *quo warranto* has been held to lie or the reverse.

(*m*) *R.* v. *Hampton* (1865), 6 B. & S. 923, where, although, as a guardian of the poor elected under the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), the defendant was elected for a year only, yet, not being removable at pleasure, he held an office which was permanent in the present sense.

(*n*) *Darley* v. *R.*, *supra*. For the court to interfere in such a case would be unnecessary, as in *Bradley* v. *Sylvester* (1871), 25 L. T. 459, where it was a question of bringing about the vacation of an office, which the employers could do without the intervention of the court; or futile, as in *Ex parte Richards* (1878), 3 Q. B. D. 368, where the applicant alleged that he had been illegally dismissed from office, and the court was satisfied that if he were reinstated, he could legally and would be dismissed immediately.

and is removable by them without reason shown (*o*); and also in respect of the office of assistant overseer (*p*), and of town clerk (*q*), and for the same reason.

Actual possession.

The court must also be satisfied that the person proceeded against has been in actual possession and user of the particular office in question (*a*). A mere claim to be admitted to the office is not sufficient; there must be a possession or user as well as a claim (*b*). Whether particular acts constitute an user of an office is a question of fact, but there is a sufficient user of the office to enable an information to issue if the steps necessary to constitute admission to the office have been taken (*c*). Thus, the making of the requisite declaration by a town councillor will be a sufficient user to found an information (*d*). A mere claim to take the steps which are a necessary preliminary to admission to an office is not a sufficient user to warrant an information (*e*); nor is an acceptance of the office which is merely conditional, as where the defendant announces his intention of not exercising an office to which he has been elected until he is free of an incompatible office held by him (*f*).

Effect of resignation.

**266.** Resignation of the office in question after a rule *nisi* for an information in the nature of a *quo warranto* has been obtained will not prevent the rule being made absolute (*g*). So, where the object of

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(*o*) *R.* v. *Fox* (1858), 8 E. & B. 939.

(*p*) *R.* v. *Simpson* (1870), 19 W. R. 73. Similarly an information was refused in respect of the office of secretary of a grand jury in Ireland (*R.* v. *Bayly*, [1898] 2 I. R. 335); and borough rate collector in Ireland (*R.* v. *Whelan* (1887), 20 L. R. Ir. 461).

(*q*) By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 17, a town clerk appointed thereunder holds office during the pleasure of the council.

(*a*) *R.* v. *Whitwell* (1792), 5 Term Rep. 85. In accordance with the principle here laid down, an information was refused against a defendant whose membership of a burial board was in question, when it was shown that he had not only declined to attend any meeting of the board, but had refrained from tendering himself to be sworn, and could therefore in no sense be regarded as a person exercising an office or franchise (*R.* v. *Jones* (1873), 28 L. T. 270). See also *Re Armstrong* (1856), 25 L. J. (Q. B.) 238, where an information was refused, the defendant having done nothing more than to merely allow his name to remain on the burgess roll, from which it was desired by the relator to remove him. Similarly, in *R.* v. *Slatter* (1840), 11 Ad. & El. 505, where it appeared that the defendant had been elected a town councillor, but that he had not been in office *de facto*, not having made the declaration under the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 50, which replaced the old process of swearing in, the rule was discharged, no user of the office having been shown.

(*b*) *R.* v. *Ponsonby* (1755), 1 Ves. 1; *R.* v. *Pepper* (1838), 7 Ad. & El. 745.

(*c*) *R.* v. *Tate* (1803), 4 East, 337, where the defendant had been sworn in as a town councillor, and although the ceremony of swearing in was defective in law, it was nevertheless held that the defendant, having not merely claimed to take the oath, but having actually taken it in a way he thought sufficient, was a proper subject for a *quo warranto* information.

(*d*) Compare *R.* v. *Slatter*, *supra*; *R.* v. *Tate*, *supra*.

(*e*) *R.* v. *Whitwell*, *supra*, where the defendant was shown to have claimed, not to exercise the office of sheriff, but only to take the oaths of office.

(*f*) *R.* v. *Tidy*, [1892] 2 Q. B. 179, where the defendant was required to show by what authority he claimed to exercise the office of vestry clerk, the objection being that he already held the incompatible office of churchwarden. See also *R.* v. *Jones*, *supra*.

(*g*) *R.* v. *Warlow* (1813), 2 M. & S. 75. Compare *R.* v. *Williams* (1894), 64 L. J. (M. C.) 34.

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the proceeding is to displace the defendant in such a manner as to leave the office open for another party to claim it, and not merely to create a vacancy to be filled up by an election (*h*), the rule may be made absolute when the resignation took place before the rule *nisi* was obtained. An information will not be granted for the purpose of trying the right to an office which is no longer in existence (*i*).

Procedure when office full.

**267.** If the office is in fact full the proper method of questioning the holder's title thereto is to proceed by means of an information in the nature of a *quo warranto* against the holder of the office (*k*).

Election to municipal offices.

**268.** Where it is provided by statute that election to a municipal office is to be questioned by an election petition (*l*), an information in the nature of a *quo warranto* will not lie, and proceedings by way of *quo warranto* have accordingly been abolished in respect of such offices (*m*). Although the statutory provisions displace *quo warranto* as a remedy in cases within their scope, nevertheless procedure by way of *quo warranto* remains applicable to all cases

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(*h*) *R.* v. *Blizard* (1866), 7 B. & S. 922, where it was pointed out by the court that if the proceedings were merely to vacate the office to make way for a new election the resignation would serve as well as removal by a *quo warranto;* but that a disclaimer by the defendant or judgment for the Crown on a *quo warranto* proceeding would leave it open to the relator to claim the office in question, which was that of town councillor.

(*i*) *R.* v. *Saunders* (1802), 3 East, 119, where, the corporation having been dissolved, the defendant claimed, as a late alderman thereof, to be returning officer in a parliamentary election, and it was held that as there were no civil rights in controversy, the office being no longer in existence, the court could not interfere; *Re Harris* (1837), 6 Ad. & El. 475, where the defendant was a late town clerk who had been removed by the council at the time of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), and who claimed compensation under s. 66 of that Act, and it was laid down that an information could not be granted to try the title to an office which was determined. Compare *R.* v. *New Radnor Aldermen* (1759), 2 Keny. 498.

(*k*) *R.* v. *Colchester Corporation* (1788), 2 Term Rep. 259, where the application was for a mandamus to admit a certain person to the office of recorder instead of the person who had been admitted, the object being to try the validity of the election; *R.* v. *Derby Corporation* (1837), 7 Ad. & El. 419, where an unsuccessful candidate for the position of councillor of a borough attempted to displace a successful rival who had been declared elected, and had been admitted to the office, by applying for a mandamus to administer to the unsuccessful candidate the declarations necessary to qualify him for the office. See also *Frost* v. *Chester Corporation* (1855), 5 E. & B. 531; *R.* v. *St. Martin's-in-the-Fields Guardians* (1851), 17 Q. B. 149, where the application was for a mandamus to elect the clerk to the board of guardians, the office being full; *R.* v. *Beedle* (1834), 3 Ad. & El. 467, where, in order to impugn an election to a body of Streets Commissioners, a mandamus was asked for and refused commanding the entry of another candidate's name as the person elected, instead of the person who had been declared elected; *R.* v. *Winchester Corporation* (1837), 7 Ad. & El. 215; *R.* v. *Ricketts* (1838), 3 Nev. & P. (Q. B.) 151; *R.* v. *Phippen* (1838), 7 Ad. & El. 966; *R.* v. *Oxford Corporation* (1837), 6 Ad. & El. 349; *R.* v. *Leeds Corporation* (1841), 11 Ad. & El. 512; *Frost* v. *Chester Corporation, supra.* As to when a mandamus is an appropriate remedy, see p. 79, *ante;* and see, generally, title CORPORATIONS, Vol. VIII., pp. 326, 333.

(*l*) See title ELECTIONS.

(*m*) *R.* v. *Morton*, [1892] 1 Q. B. 39; see also *R.* v. *Miles, Ex parte Cole* (1895), 59 J. P. 407, and Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 87; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48.

outside that category. So, although an election petition is the proper remedy when an election is objected to on the ground that the person whose election is questioned was, at the time of the election, disqualified, yet the remedy by *quo warranto* is left untouched where a person becomes disqualified after election, or where there is a continuing disqualification—in other words, where the objection is a continuous holding of the office by the person disqualified (*n*).

Charities.

**269.** An information in the nature of a *quo warranto* is not an appropriate form of procedure where the office in question is of an eleemosynary character. Accordingly, an information will be refused in respect of the office of master of a hospital and free school, which institution is a private charitable foundation, and the right of appointment to offices therein is in governors who are private and not public functionaries. Moreover, it is immaterial that a charter of incorporation for the institution has been obtained from the Crown (*o*).

For the same reason a *quo warranto* information is not an appropriate procedure in respect of such an office as that of committeeman of the Licensed Victuallers' Association (*p*).

Legality of charters.

**270.** Again, *quo warranto* proceedings will not be permitted for the purpose of attacking the legality of a charter of incorporation granted to a town through an officer appointed thereunder. Accordingly, an information in the nature of a *quo warranto* calling upon the defendant to show by what authority he claims to be coroner of a borough, on the ground that the borough charter has not been properly granted, will be refused (*q*); as also if the mayor of a borough is made the defendant for a similar purpose (*r*), as the real object is not to test the validity of the appointment, but to call in question the charter of incorporation.

Non-corporate franchises.

**271.** The principles which determine whether or not a *quo warranto* information will lie in respect of a corporate office apply,

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(*n*) *R.* v. *Beer*, [1903] 2 K. B. 693, where the defendant was called upon to show by what authority he claimed to hold the office of councillor of a borough, the objection being that he was a bankrupt, and therefore disqualified by reason of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32, which provides that a bankrupt shall be disqualified for "being elected to or holding or exercising the office of mayor, alderman, or councillor," and it was held that, although an election petition would have been the appropriate remedy for objecting to the election, yet the remedy by *quo warranto* had not been taken away in other cases, as here, where the disqualification was in respect of holding or exercising the office, as well as being elected thereto. As to qualification for municipal office, see titles ELECTIONS; LOCAL GOVERNMENT.

(*o*) *R.* v. *Mousley* (1846), 8 Q. B. 946; followed in *R.* v. *Auchinleck* (1891), 28 L. R. Ir. 404, where the office in question was that of surgeon or physician to an hospital founded by private persons and afterwards incorporated by Act of Parliament. Compare *R.* v. *Gregory* (1772), cited at 4 Term Rep. 240, n., where it was held that a *quo warranto* information would not lie for the purpose of trying the validity of an election to a fellowship of a college. As to the officers of charitable institutions, see title CHARITIES, Vol. IV., p. 247.

(*p*) *Ex parte Smith* (*Abel*) (1863), 8 L. T. 458.

(*q*) *R.* v. *Taylor* (1840), 11 Ad. & El. 949.

(*r*) *R.* v. *Jones* (1863), 8 L. T. 503.

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so far as is possible, to other franchises. Thus, an application for an information calling upon the defendant to show by what authority he has made and set up a franchise of a private nature will be refused (*s*). And a *quo warranto* information is not the proper procedure by which to try the question whether or not a franchise is properly exercised in respect of which there could be no judgment of ouster or which could not be seized with the King's hands (*t*).

Discretion of the court.

**272.** When the title to a corporate office is in question the court will not grant leave to file a *quo warranto* information as a matter of course simply because a reasonable doubt as to the legal validity of the title is shown. It is wholly within the discretion of the court to grant or refuse an information in such case, and the court will take into consideration the consequences which would be likely to follow should the information be granted, and also all the circumstances of the application (*a*).

The court will accordingly refuse to disturb the peace and quiet of a corporation by granting leave to file an information where to do so would be merely vexatious, as where there has been an irregularity in the election to the office which is without any material result (*b*), or which cannot be shown to have been productive of harm (*c*). Again, where the circumstances of the application are such as to throw suspicion upon the motives of the relator, the court will not grant an information the consequences of which may be to dissolve the corporation (*d*); nor where there is ground for supposing that the relator is not the real prosecutor

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(*s*) *Lowther's* (*Sir Wm.*) *Case* (1725), 2 Ld. Raym. 1409, where the proceedings were in respect of having set up a warren.

(*t*) *R.* v. *Durham Justices, Ex parte Sunderland Justices* (1860), 2 L. T. 372, where the question was whether or not a bench of justices had the exclusive right of granting ale-house licences. "In case of judgment for the King, for that the party is entitled to no such franchise, or hath disused or abused it, the franchise is either seised into the King's hands, to be granted out again to whomever he shall please; or, if it be not such a franchise as may subsist in the hands of the Crown, there is merely judgment of ouster, to turn out the party who usurped it" (3 Bl. Com. 263). For a list of miscellaneous franchises for which *quo warranto* has lain, see Co. Ent. ("Quo Warranto"), p. 527.

(*a*) *R.* v. *Wardroper* (1766), 4 Burr. 1963; *R.* v. *Dawes* (1767), 4 Burr. 2022; *R.* v. *Sargent* (1793), 5 Term Rep. 466; *R.* v. *Stacey* (1785), 1 Term Rep. 1; *R.* v. *Parry* (1837), 6 Ad. & El. 810; *R.* v. *Trevenen* (1819), 2 B. & Ald. 339; *R.* v. *Cousins* (1873), L. R. 8 Q. B. 216.

(*b*) *R.* v. *Ward* (1873), L. R. 8 Q. B. 210, where BLACKBURN, J., said at p. 213, referring to stat. (1693) 4 & 5 Will. & Mar. c. 18, s. 2, "the very object of requiring the information to be filed only with the express order of the Queen's Bench made in open court was that the court might in its discretion refuse to file an information when it would be vexatious to do so." The application was in respect of the office of member of a local board of health, and the objection was that the defendant was chairman and therefore returning officer, and accordingly ineligible as a candidate. The court found that the mistake had produced no material result, inasmuch as the same person would have been chosen had the election been conducted on strictly regular lines, and refused to disturb the peace of the district by filing an information. BLACKBURN, J., added, however, that the decision would not apply when the chairman wilfully and contumaciously acted in his own election.

(*c*) *R.* v. *Cousins* (1873), L. R. 8 Q. B. 216; see also *Bradley* v. *Sylvester* (1871), 25 L. T. 459, at p. 460.

(*d*) *R.* v. *Trevenen* (1819), 2 B. & Ald. 339, 479.

but is the instrument of other persons who are incompetent as relators (*e*), or that he is applying in collusion with strangers (*f*). But an information will not be refused simply because its effect would be to dissolve the corporation (*g*), nor only because a person, not a member of the corporation, has been furnishing the means of carrying on proceedings (*h*), nor merely because the application is a friendly proceeding (*i*).

SUB-SECT. 3.—*Who may apply for a Quo Warranto Information.*

The Attorney-General.

**273.** An information calling upon a corporation, or a number of individuals claiming to be a corporation, to show cause by what authority they, as an aggregate body, claim to act as a corporation, can only be filed *ex officio* by the Attorney-General on behalf of the Crown, and not by a private relator (*k*).

Private relators.

**274.** A private relator may apply for an information against the several members of a corporation on grounds affecting their individual titles, to show by what authority they respectively claim to exercise their individual functions (*l*). In order that the right to offices and franchises in corporations and boroughs might be speedily tried and determined it was provided by statute (*a*) that an information in the nature of a *quo warranto* might be exhibited at the relation of any person against persons intruding into or unlawfully holding and executing the offices of mayors, bailiffs, portreeves, and other offices within cities, towns, corporate boroughs and places in England and Wales, and the provisions of the statute have been held to apply to corporate offices though not in a municipal corporation, but not to offices of a *quasi*-corporate nature in a non-corporate district (*b*).

Interest essential.

**275.** A private relator must have some interest in the election he impeaches (*c*). To attack the possessor of an office in the corporation

(*e*) *R.* v. *Cudlipp* (1796), 6 Term Rep. 503.
(*f*) *R.* v. *Trevenen* (1819), 2 B. & Ald. 339, 479.
(*g*) *R.* v. *Parry* (1837), 6 Ad. & El. 810; *R.* v. *Morris* (1803), 3 East, 213.
(*h*) *R.* v. *Wakelin* (1830), 1 B. & Ad. 50.
(*i*) *R.* v. *Marshall* (1817), 2 Chit. 370.
(*k*) *R.* v. *Carmarthen Corporation* (1759), 2 Burr. 869; *R.* v. *Ogden* (1829), 10 B. & C. 230; and see *R.* v. *Staples* (1867), 9 B. & S. 928, n.
(*l*) *R.* v. *Carmarthen Corporation, supra*; *R.* v. *White* (1836), 5 Ad. & El. 613. It follows that where the same objection applies to every member of the corporation (as in *R.* v. *White, supra*), a private relator can in effect assail the whole corporation, and the information will not be refused simply because to grant it involves the possible dissolution of the corporation (*ibid.*, *per* WILLIAMS, J., at p. 619).
(*a*) 9 Ann. c. 25 (1710), preamble and s. 4.
(*b*) See *R.* v. *Backhouse* (1867), 7 B. & S. 911, at p. 920; and *R.* v. *M'Kay* (1826), 5 B. & C. at p. 646.
(*c*) *R.* v. *Briggs* (1864), 11 L. T. 372, *per* CROMPTON, J., at p. 372: "The object of having a relator who has an interest is that a mere man of straw should not be put forward"; *R.* v. *Thirlwind* (1864), 33 L. J. (Q. B.) 171, where it was held that for the relator to describe himself in his affidavit as "I, A. B. of Bolton, tailor" was insufficient as disclosing no adequate interest in the election which was in question. There may, however, be two or more relators, and it seems that the information will be granted at the instance of any one of them who is duly qualified, although the others are incompetent (see Cole, Quo Warranto, 172).

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of a borough the relator need not be a burgess. He has a sufficient interest if he is an inhabitant subject to the government of the corporation (*d*). Also the owner of rated property in the town has sufficient interest in the election of the corporation thereof to be a good relator, even though he is not qualified to vote (*e*).

Impeaching qualification of relator.

**276.** The qualification of a person to act as relator can be successfully impeached if it can be shown that, at the time, he acquiesced in the election to which he objects (*f*); or that he has concurred in another election of like kind with that to which he objects, and which was subject to the same objection (*g*); or that he stands in the same situation as the defendant, so that he would have no title to his own office if his objection to the defendant's election were successful (*h*); or that he is raising an objection which might have been put forward against himself at a previous election (*i*); or that, while cognisant of the objection to the defendant's election, he voluntarily so acted in an official capacity as to enable the defendant to exercise the office (*k*). It is a fatal objection to a relator that he was a party to an agreement made by the corporation, of which he was a member, not to enforce the bye-law which he invokes in support of his application (*l*); or that, while legal adviser to the defendant, he has, since the latter has exercised the office in question, advised him that his election was good (*m*).

A relator is not disqualified from making an application for a *quo warranto* information because he has attended corporation meetings at which the defendant was present in his official capacity during the period following the latter's election, provided he is not shown to have concurred in such election (*n*). Nor can it be objected that the relator concurred in an election if he can show that he did so in ignorance of the circumstances which are alleged to render it invalid (*o*).

On special circumstances being shown, a new relator may be substituted for the original one (*p*).

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(*d*) *R.* v. *Hodge* (1819), 2 B. & Ald. 344, n.; *R.* v. *Parry* (1837), 6 Ad. & El. 810; *R.* v. *Quayle* (1840), 11 Ad. & El. 508; and see *R.* v. *Wells* (1895), 43 W. R. 576.

(*e*) *R.* v. *Briggs* (1864), 11 L. T. 372.

(*f*) *R.* v. *Trevenen* (1819), 2 B. & Ald. 339; *R.* v. *Stacey* (1785), 1 Term Rep. 1; and compare *R.* v. *Smith* (1790), 3 Term Rep. 573.

(*g*) *R.* v. *Parkyn* (1831), 1 B. & Ad. 690; *R.* v. *Symmons* (1791), 4 Term Rep. 223.

(*h*) *R.* v. *Cudlipp* (1796), 6 Term Rep. 503; *R.* v. *Bond* (1788), 2 Term Rep. 767, where the defendant was called upon to show by what authority he executed the office of a free burgess, on the ground that he had been improperly sworn in, and it appeared that the relator had been sworn in at the same time and in the same way; see also *R.* v. *Cowell* (1825), 6 Dow. & Ry. (K. B.) 336.

(*i*) *R.* v. *Lofthouse* (1866), 7 B. & S. 447.

(*k*) *R.* v. *Greene* (1842), 2 Gal. & Dav. 24.

(*l*) *R.* v. *Mortlock* (1789), 3 Term Rep. 300.

(*m*) *R.* v. *Payne* (1818), 2 Chit. 369.

(*n*) *R.* v. *Benney* (1831), 1 B. & Ad. 684; *R.* v. *Clarke* (1800), 1 East, 38.

(*o*) *R.* v. *Slythe* (1827), 9 Dow. & Ry. (K. B.) 226; and see *R.* v. *Morris* (1803), 3 East, 213.

(*p*) Crown Office Rules, r. 46; see *R.* v. *Alderson* (1839), 11 Ad. & El. 3, where the circumstance that the same attorney acted on both sides induced the

SUB-SECT. 4.—*Limitation as to Time for Quo Warranto Proceedings.*

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Time limit.

**277.** An application for an information in the nature of a *quo warranto* against any person claiming to hold a corporate office must be made before the expiration of twelve months from the time when he became disqualified after election (*q*), counting from the day following that on which the disqualification began (*r*). The same limitation of time applies in respect of the offices of chairman, member, committeeman, or officer of a county council (*a*).

In cases not within the scope of the above provisions it would appear that the court may still exercise its discretion as to the time within which an information in the nature of a *quo warranto* is to be applied for (*b*); and, in the case of an annual office, an application for an information may be rejected if not made within the year (*c*), although six years will be the most usual limit (*q*).

Municipal elections.

**278.** Every municipal election not called in question within twelve months after the election, either by election petition or by information in the nature of a *quo warranto*, is to be deemed to have been to all intents a good and valid election (*d*).

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court to transfer the conduct of the prosecution from the original relator to another person concerned with the proceeding.

(*q*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 225, repealing and re-enacting the Municipal Corporations (General) Act, 1837 (7 Will. 4 & 1 Vict. c. 78), s. 23. For instances of the application of the rule, see *Ex parte Birkbeck* (1874), L. R. 9 Q. B. 256; *R.* v. *Francis* (1852), 18 Q. B. 526. So long ago as 1766, in the *Winchelsea Causes* (1766), 4 Burr. 1963, the court thought it necessary to fix a period after which quiet possession of an office should not be disturbed, and laid it down that after twenty years' unimpeached possession of a corporate franchise no rule ought to be granted against a person in possession. For instances of the application of the rule in this shape, see *R.* v. *Newling* (1789), 3 Term Rep. 310; *R.* v. *Bond* (1788), 2 Term Rep. 767. This rule was reconsidered in *R.* v. *Dicken* (1791), 4 Term Rep. 282, and the court then resolved to limit its discretion in regard to the granting of applications of this nature to six years. The six years' limit was given statutory sanction in stat. (1792) 32 Geo. 3, c. 58, which Act was repealed by the Statute Law Revision Act, 1887 (50 & 51 Vict. c. 59), having been previously repealed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), as to boroughs within that Act.

(*r*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 230.

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75.

(*b*) In *R.* v. *Brooks* (1828), 8 B. & C. 321, the court, in the exercise of its discretion, and without deciding whether the case was within stat. (1792) 32 Geo. 3, c. 58 (see note (*q*), *supra*), refused a *quo warranto* information where the defendant had exercised a corporate office for more than six years.

(*c*) *R.* v. *Hodson* (1842), cited at 4 Q. B. 648, n.; *R.* v. *Anderson* (1842), 2 Gal. & Dav. 113.

(*d*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 73. This section provides a remedy for the difficulty which arose in the case of derivative titles, for which see *R.* v. *Preece* (1843), 5 Q. B. 94, where a rule was asked for against the mayor of a borough within twelve months of his election, on the ground that his aldermanic title, on which his title of mayor was founded, was defective, though more than twelve months had elapsed since his election to the office of alderman, and no question could therefore be raised in regard thereto by reason of the Municipal Corporations (General) Act, 1837 (7 Will. 4 & 1 Vict. c. 78), s. 23, and the rule was refused. In *R.* v. *Stokes* (1813), 2 M. & S. 71, the same question arose, but the decision is not clear; see also *R.* v. *Peacock* (1792), 4 Term Rep. 684; and see title ELECTIONS.

SECT. 5. SUB-SECT. 5.—*Procedure.*

Quo Warranto.

Application.

**279.** With the exception of *ex-officio* informations filed by the Attorney-General on behalf of the Crown, no information in the nature of a *quo warranto* can be filed without the express order of the King's Bench Division of the High Court made in open court (*e*).

The application for an information is by motion to a divisional court for an order *nisi*, except in cases where it is made *ex officio* or in respect of a corporate office within the meaning of the Municipal Corporations Act, 1882 (*f*). In the latter case (*g*) the application is by ten days' notice of motion to the person affected thereby (*h*).

Affidavit in support.

**280.** It is essential that, at the time of moving, an affidavit should be produced, in which the relator deposes that such motion is made at his instance (*i*). It is not enough to depose that in case the court should order the information to be exhibited it was his intention to become the relator, for it is not thereby stated at whose instance the application is made (*k*). The affidavit must show that the relator is duly qualified to act as such (*l*). If the affidavit of the relator alone is insufficient, it may be supported by the affidavits of other persons, and the information granted, although such other persons may not be qualified to be relators themselves (*m*).

No objection to the defendant's title, which is not specified in the order to show cause or notice of motion, can be raised by the relator on the pleadings or urged on the motion without the special leave of the court or a judge (*n*).

It is not enough to state in the affidavit supporting the application that the defendant is not entitled to the office and that the relator is so entitled, for the objections to the defendant's title are not thereby specified (*o*). The defendant cannot be called upon to

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(*e*) Crown Office Rules, 1906, r. 35, which rule also provides for recognisances. The substance of this rule is found in stat. 4 & 5 Will. & Mar. c. 18, s. 2, which Act, though not specifically referring to informations in the nature of *quo warranto*, had been applied to such informations in various reported cases, the ground being that the usurpation of an office or franchise of the Crown amounted to a misdemeanour; see *R.* v. *Hertford Corporation* (1700), 1 Salk. 376; *R.* v. *Morgan* (1736), 2 Stra. 1042; *R.* v. *Roberts* (1831), 2 B. & Ad. 63.

(*f*) 45 & 46 Vict. c. 50, s. 225; Crown Office Rules, 1906, r. 40.

(*g*) See p. 132, *ante*.

(*h*) Crown Office Rules, 1906, r. 41; see also Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 225 (2). For the contents of the notice, see Crown Office Rules, r. 42, and Appendix, Form No. 34.

(*i*) Crown Office Rules, r. 43, which is reproduced from a rule of court dated 8th November, 1839 (11 Ad. & El. 2). For form of affidavits and practice as to filing, see *ibid.*, rr. 5—11.

(*k*) *R.* v. *Hedges* (1840), 11 Ad. & El. 163; and compare *R.* v. *Anderson* (1842), 2 Q. B. 740.

(*l*) *R.* v. *Thirlwind* (1864), 33 L. J. (Q. B.) 171; see note (*c*), p. 135, *ante*.

(*m*) *R.* v. *Parry* (1837), 6 Ad. & El. 810; *R.* v. *Brame* (1836), 4 Ad. & El. 664; *R.* v. *Symmons* (1791), 4 Term Rep. 223.

(*n*) Crown Office Rules, r. 44. For the original rule made Hilary Term, 1827, see 6 B. & C. 267. See also *R.* v. *Thomas* (1838), 8 Ad. & El. 183; and compare *R.* v. *Tugwell* (1868), L. R. 3 Q. B. 704.

(*o*) *R.* v. *Edye* (1848), 12 Q. B. 936. Other cases dealing with the sufficiency or insufficiency of affidavits used in *quo warranto* applications are *R.* v. *Slatter* (1840), 11 Ad. & El. 505; *R.* v. *Harwood* (1802), 2 East, 177; *R.* v. *Slythe* (1827),

show generally the validity of his election, for the onus is upon the relator to show a disqualification in the defendant (*p*).

If the substantial ground of the original application fails, an information will not be granted on a secondary or supplemental ground, which is not the question for the solution of which the rule *nisi* was obtained (*q*).

Pleading.

**281.** The defendant pleads to an information as if it were a statement of claim (*r*). If he does not intend to defend he may, to prevent judgment going by default, enter a disclaimer, upon which judgment of ouster may be entered (*a*). The effect of a disclaimer is the same as the effect of making the rule absolute, inasmuch as it leaves the office vacant for another party, without the necessity of another election (*b*).

The prosecutor, in answer to a plea that the defendant has held and executed the office or franchise for six years before exhibiting the information, may reply any forfeiture, surrender, or avoidance by the defendant within that time (*c*).

Second application.

**282.** The court will refuse to grant a rule *nisi* upon a second application on the same grounds and against the same person, even though the affidavits in the second application impeach those in the first (*d*). Nor, where a rule has been discharged, will the court entertain an application on the same grounds against the successor in office of the first defendant (*e*).

Consolidation.

**283.** The court may order the consolidation of several orders *nisi* granted against different persons in respect of the same offices on the same grounds, so that one information alone may be tried (*f*).

Rules of Supreme Court applicable.

**284.** The Rules of the Supreme Court as to appeals and amendment (*g*) apply to all civil proceedings on the Crown side, including

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6 B. & C. 240; *R.* v. *Quayle* (1840), 11 Ad. & El. 508; *R.* v. *Day* (1829), 9 B. & C. 702; *R.* v. *Rolfe* (1833), 1 Nev. & M. (K. B.) 773; *R.* v. *Hughes* (1828), 7 B. & C. 708; *R.* v. *Barzey* (1815), 4 M. & S. 253.

(*p*) *R.* v. *Jefferson* (1833), 5 B. & Ad. 855, where the rule was discharged because, it being alleged that a large proportion of the votes cast were bad, it was not shown for whom the bad votes were given.

(*q*) *R.* v. *Osbourne* (1803), 4 East, 327, where the original issue was the proper mode of election, and the secondary issue which it was sought to set up on the failure of the primary issue was the length of the notice of election.

(*r*) Crown Office Rules, r. 123. The pleadings and proceedings are as in an action (*ibid.*). It is not enough for the defendant to merely traverse the allegations in the information; he must show a good title, or allege that he did not exercise the office (see *R.* v. *Leigh* (1768), 4 Burr. 2143).

(*a*) *Ibid.*, r. 48. For form of disclaimer, see *ibid.*, Appendix, Forms, No. 35; and for form of judgment of ouster, see *ibid.*, Appendix, Forms, No. 36.

(*b*) *R.* v. *Blizard* (1866), L. R. 2 Q. B. 55; and see p. 132, *ante*.

(*c*) Crown Office Rules, r. 124; and compare note (*q*), p. 137, *ante*.

(*d*) *R.* v. *Orde* (1830), cited at 8 Ad. & El. 420, n.

(*e*) *R.* v. *Langhorn* (1833), 2 Nev. & M. (K. B.) 618.

(*f*) Crown Office Rules, r. 47. This procedure is founded on the Municipal Offices Act, 1710 (9 Ann. c. 25), s. 4. For an instance of its application under that statute, see *R.* v. *Foster* (1758), 1 Burr. 573; and compare *R.* v. *Warlow* (1813), 2 M. & S. 75.

(*g*) Crown Office Rules, r. 206, applies R. S. C., Ord. 58 (appeals), and *quo*

SECT. 5. Quo Warranto.

*quo warranto* informations, so far as they are relevant (*h*); and pleadings, trial, judgment and execution proceed as in an action (*i*).

SUB-SECT. 6.—*Costs.*

Costs.

**235.** The court may discharge an order *nisi* for an information with or without costs (*k*). Moreover, it may in its discretion direct the costs to be paid by any party other than the proposed relator who joins in the affidavits in support of the application (*l*).

A private relator who has obtained judgment is entitled to the costs of the prosecution as a matter of course (*m*). If, however, in any information not *ex officio* the prosecutor does not proceed to trial within a year after issue joined, the court may, on motion for the same, award the defendant his costs to the amount of the recognisances entered into by the prosecutor on filing the information (*n*).

Where the defendant resigns or disclaims the court will exercise its discretion as to costs (*o*).

The Rules of the Supreme Court as to costs apply to *quo warranto* proceedings so far as they are applicable thereto (*p*).

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*warranto* proceedings are expressly included. The proviso to R. S. C., Ord. 68, r. 2, that Ord. 58 (appeals) shall not apply to *quo warranto* proceedings is therefore virtually repealed. Crown Office Rules, r. 260, applies R. S. C., Ord. 28 (amendment).

(*h*) So long ago as 1788 it was held that a new trial might be granted in *quo warranto* proceedings on the ground that "of late years a *quo warranto* information has been considered merely in the nature of a civil proceeding" (*R.* v. *Francis* (1788), 2 Term Rep. 484).

(*i*) Crown Office Rules, r. 123. In *R.* v. *Edgar* (1769), 4 Burr. 2297, it was held that a motion to quash an information in the nature of a *quo warranto* was an improper motion.

(*k*) See, for instance, *R.* v. *Wardroper* (1766), 4 Burr. 1963, where the rule was discharged with costs because the application was unreasonable and groundless; *R.* v. *Lewis* (1759), 2 Keny. 497, where the result was the same, the application being vexatious and founded on perjury. See also *R.* v. *Carter* (1904), 68 J. P. 466.

(*l*) Crown Office Rules, r. 45, which embodies the practice followed in *R.* v. *Greene* (1843), 4 Q. B. 646, where, a rule *nisi* having been discharged, and it appearing that the relator, who was unable to pay the costs, had been procured to make the application by another person, the court ordered the party so promoting the application to pay the costs.

(*m*) *R.* v. *Dudley* (1840), 4 Jur. 915, where it was held that he was also entitled to the costs of an interlocutory motion in which he had not been successful. See also *R.* v. *Amery* (1793), 1 Anst. 178, H. L.

(*n*) Crown Office Rules, rr. 35, 38; *Ballard* v. *Halliwell* (1896), 65 L. J. (Q. B.) 332, where a notice of application for an information had been made under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 225, but before the application could be heard the applicant gave notice of abandonment, and it was held that the defendant must have his costs.

(*o*) *R.* v. *Blizard* (1866), L. R. 2 Q. B. 55, where the relator was given the costs of the information and disclaimer only, not the costs of the rule, the defendant having resigned before the rule *nisi* was obtained; *R.* v. *Holt* (1818), 2 Chit. 366, where, in the special circumstances of the case, the court allowed a disclaimer to be entered without costs; *R.* v. *Newcombe* (1866), 15 W. R. 108, where the rule was made absolute without costs, the defendant having resigned as soon as the rule had been obtained without showing cause; *R.* v. *May* (1851), 20 L. J. (Q. B.) 268, where the defendant was allowed to escape costs if within a week he made a valid resignation or at his own expense put in a valid disclaimer; and compare *R.* v. *Earnshaw* (1853), 22 L. J. (Q. B.) 174.

(*p*) Crown Office Rules, r. 261, applying R. S. C., Ord. 65 (costs).

## SECT. 6.—*Prohibition.*

### SUB-SECT. 1.—*In General.*

Definition.

**286.** The writ of prohibition (*q*) is a prerogative writ, issuing out of the High Court of Justice (*r*), and directed to an ecclesiastical or inferior temporal court (*s*), which forbids such court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land (*t*).

Prohibition *quousque*.

**287.** Besides the ordinary peremptory writ of prohibition a writ may also be granted *quousque* (*u*), that is, until the inferior court alters its decision; this form of writ is applicable when a right has been denied or perverted, such as the denial of a copy of the "libel" in an ecclesiastical case, and possibly when in an ecclesiastical court evidence is refused which by the common law ought to be admitted (*x*). This form is not applicable where a valid plea has been refused or a defence on the merits has been rejected (*a*).

Writ is of right.

**288.** With certain exceptions (*b*), the issue of the writ of prohibition, though not of course, is of right and not discretionary, and the superior court cannot refuse to enforce public order in the administration of the law by the denial of a grant of the writ (*c*); smallness of the matter in dispute and delay on the part of the applicant are not in themselves grounds for a refusal (*d*). The writ,

(*q*) See Com. Dig. tit. Prohibition; Bac. Abr. tit. Prohibition; 3 Bl. Com. p. 112. See also *Mackonochie* v. *Penzance* (*Lord*) (1881), 6 App. Cas. 424, and p. 142, *post*.

(*r*) See p. 152, *post*. The writ was issued originally only out of the King's Bench, as it was the King's prerogative writ. In Com. Dig. tit. Prohibition, it is stated that in prohibition there is, first, "contempt of the Crown"; and, secondly, "damage to the party." In Bac. Abr. tit. Prohibition, it is said that the superior courts of Westminster have a superintendency over all inferior courts and may in all cases of innovation etc. award a prohibition; prohibitions do not import that the ecclesiastical or inferior tribunals are "*alia* than the King's courts," but signify that the cause is prohibited "*ad aliud examen*," and that in the inferior court it is "*contra coronam et dignitatem regiam*." As to inferior courts, see title COURTS, Vol. IX., p. 11.

(*s*) See p. 149, *post*; and title COURTS, Vol. IX., pp. 14, 15; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5), "No cause or proceeding at any time pending in the High Court or before the Court of Appeal shall be restrained by prohibition"; but this, of course, does not affect a stay of proceedings by other means.

(*t*) See p. 142, *post*.

(*u*) *Anon.* (1704), 6 Mod. Rep. 308; *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239, *per* WILLES, J., at p. 276; and Bac. Abr., Vol. VI., p. 578.

(*x*) *White* v. *Steele* (1862), 13 C. B. (N. S.) 231, *per* WILLES, J.

(*a*) *Ibid.*

(*b*) As to these, see pp. 147, 148, *post*.

(*c*) The writ is said to be "*ex debito justitiæ*"; compare *Burder* v. *Veley* (1841), 12 Ad. & El. 233, Ex. Ch.; *De Haber* v. *Portugal* (*Queen*), *Wadsworth* v. *Spain* (*Queen*) (1851), 17 Q. B. 171, *per* Lord CAMPBELL, C.J., at p. 214; *London Corporation* v. *Cox*, *supra*, *per* WILLES, J., at p. 278; *Clarke* v. *Bradlaugh* (1881), 8 Q. B. D. 63, C. A.; *Farquharson* v. *Morgan*, [1894] 1 Q. B. 552, C. A., where Lord HALSBURY, in his judgment in the Court of Appeal, felt bound to grant the writ, although the applicant had no merits. It has always been the policy of our law to keep inferior courts strictly within their proper sphere of jurisdiction (*ibid.*, *per* DAVEY, L.J., at p. 560). See also *Jackson* v. *Beaumont* (1855), 11 Exch. 300.

(*d*) *Worthington* v. *Jeffries* (1875), L. R. 10 C. P. 379; approved in *Ellis* v. *Fleming* (1876), 1 C. P. D. 237.

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however, cannot be claimed, as of right, unless the defect of jurisdiction is clear (*e*), nor will it, as a rule, be granted where an amendment in a plea will cure the alleged defect (*f*).

SUB-SECT. 2.—*Grounds of Prohibition.*

When the writ lies.

**289.** Prohibition lies not only for excess of or absence of jurisdiction, but also for the contravention of some statute or the principles of the common law (*g*); it does not, however, lie to correct the course, practice, or procedure of an inferior tribunal, or a wrong decision on the merits of proceedings (*h*).

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(*e*) *Re Birch* (1855), 15 C. B. 743; and compare *Ricardo* v. *Maidenhead Local Board of Health* (1857), 27 L. J. (M. C.) 73, where, however, a prohibition was asked for after judgment but before enforcement: in this case there was an alternative remedy. See also *Taylor* v. *Nicholls* (1876), 1 C. P. D. 242; and compare *The Charkieh* (1873), L. R. 8 Q. B. 197, where prohibition was refused where the Court of Admiralty had decided a difficult point of international law.

(*f*) *Blunt* v. *Harwood* (1838), 8 Ad. & El. 610, where leave was given to amend a "libel" by alleging a sufficient notice for the purpose of a rate.

(*g*) *Mackonochie* v. *Penzance* (*Lord*) (1881), 6 App. Cas. 424, *per* Lord SELBORNE, L.C., at p. 431, and *per* Lord BLACKBURN, at p. 443; *Veley* v. *Burder* (1841), 12 Ad. & El. 265, Ex. Ch., *per* TINDAL, C.J., at p. 312; *Gould* v. *Gapper* (1804), 5 East, 345, *per* Lord ELLENBOROUGH, C.J., at p. 361; this principle seems now to be clear, although questioned in *Home* v. *Camden* (*Earl*) (1795), 2 Hy. Bl. 533, H. L., and doubted by BULLER, J., in *Full* v. *Hutchins* (1776), 2 Cowp. 422, as to which, see p. 146, *post*. See also *White* v. *Steele* (1862), 13 C. B. (N. S.) 231, *per* WILLES, J., at p. 265, as to the grant of prohibition where evidence which at common law should have been received is refused by the ecclesiastical court.

(*h*) *Mackonochie* v. *Penzance* (*Lord*), *supra*, where it was held that the sentence of suspension from a benefice, which can only be pronounced by an ecclesiastical court, will not, if regular, be prohibited, although it affects temporal rights; *Re Dunford* (1848), 12 Jur. 361, where it was held that the mere receipt of improper evidence in an inferior court is no ground of prohibition; but the case is otherwise if evidence is received contrary to the terms of a statute; compare *R.* v. *Greenwich County Court Judge* (1888), 60 L. T. 248, C. A., where it was held that an erroneous decision as to the admissibility or the absence of evidence is no ground for a prohibition. Prohibition will not lie where a question of time merely is involved (*Barker* v. *Palmer* (1881), 8 Q. B. D. 9, *per* GROVE, J., at p. 11).

Prohibition will not be granted for a slip or defect in the form of a judgment of an inferior court, which can be appealed against (*Enright* v. *Penzance* (*Lord*) (1882), 7 App. Cas. 240); nor for the fact that the chancellor of a diocese has not, when requested, consulted his bishop before judgment (*R.* v. *Tristram* (*Dr.*), [1901] 2 K. B. 141); nor for the wrongful admission without proof of a claim or the wrongful striking out of a counterclaim by the registrar of a county court (*Hooper* v. *Hill*, [1894] 1 Q. B. 659, C. A.); nor after judgment on an objection to the jurisdiction of an inferior court that the defendant was not domiciled in England (*Ex parte Michael* (1872), 41 L. J. (Q. B.) 349). See also title COUNTY COURTS, Vol. VIII., pp. 611—614.

If a judge in deciding whether he has power to specially certify for costs decides wrongly, this is not the subject of prohibition (*Farrow* v. *Hague* (1864), 33 L. J. (EX.) 258); nor is the grant of costs in the Mayor's Court on a higher scale, without the statement of reasons, as ordered by the statute (*R.* v. *London Corporation and Stock* (1893), 69 L. T. 721); but a prohibition will be granted for the total absence of a certificate in such circumstances (*Howard* v. *Graves* (1885), 52 L. T. 858). Prohibition has also been granted where the judge of an inferior court attempted to impose (illegally) a reference on parties without their consent in a matter in which the court itself had jurisdiction (*Re London Scottish Permanent Building Society* (1893), 63 L. J. (Q. B.) 112). Prohibition also lies where by improper splitting up of a claim jurisdiction has *primâ facie* been given to an inferior court (*Re Aykroyd, Grimbly* v. *Aykroyd* (1848), 1 Exch. 479).

Prohibition lies against a judge of an inferior court where such judge is interested in the suit (*i*); it is also granted where the judge of such court (not merely by way of correcting a slip in the drawing up of an order) alters or rescinds his judgment (*k*), or, on application for new trial in the county court, enters judgment for the applicant (*l*).

Immaterial objections to writ.

The court, in deciding whether or not to grant a writ of prohibition, will not be fettered by the fact that an alternative remedy exists to correct the absence or excess of jurisdiction (*m*), or an appeal lies against such absence or excess (*n*), or because an appeal against such absence or excess has already failed (*o*). Similarly the fact that an appeal on the merits of the case has already failed (*p*), or that the party applying for prohibition has himself initiated the proceedings in the inferior court (*q*), is not material to the decision of the court to grant or to refuse the writ.

Prohibition will not be granted unless there is a material question involved (*r*); on the other hand, a claim framed for a cause of action not within the jurisdiction under colour of another cause of action which is within the jurisdiction is subject to prohibition (*s*).

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(*i*) *Ex parte Medwin* (1853), 1 E. & B. 609; *Dimes* v. *Grand Junction Canal Co.* (1852), 3 H. L. Cas. 759, *per* PARKE, B., at p. 785; compare *Serjeant* v. *Dale* (1877), 2 Q. B. D. 558, as to a bishop acting under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), where he was interested in the patronage of a living, and where prohibition was granted against the Court of Arches. For the degree of interest, other than pecuniary, necessary to disqualify, see *R.* v. *Farrant* (1887), 20 Q. B. D. 58 (where the fact of a magistrate being subpœnaed was held not to disqualify him from sitting); and title MAGISTRATES.

(*k*) *Re London Scottish Permanent Building Society* (1893), 63 L. J. (Q. B.) 112; *Sweetland* v. *Turkish Cigarette Co.* (1899), 47 W. R. 511. The judge is (after judgment) *functus officio*. See also *The Recepta, Gordon* v. *Francis* (1893), 9 T. L. R. 535, C. A.; *Irving* v. *Askew* (1870), 39 L. J. (Q. B.) 118; *Re Jones* v. *Jones* (1848), 17 L. J. (Q. B.) 170, *per* COLERIDGE, J., at p. 171: "I do not say but what a judge may alter his judgment the same day and at the same court." See titles COUNTY COURT, Vol. VIII., p. 611; COURTS, Vol. IX., p. 13.

(*l*) *Robinson* v. *Fawcett and Firth*, [1901] 2 K. B. 325; see County Courts Acts, 1888 (51 & 52 Vict. c. 43), s. 93; and title COUNTY COURTS, Vol. VIII., p. 611.

(*m*) *Channel Coaling Co.* v. *Ross*, [1907] 1 K. B. 145, where the County Court Rules provided a remedy for illegal service out of the jurisdiction.

(*n*) *Veley* v. *Burder* (1841), 12 Ad. & El. 265, Ex. Ch.; *White* v. *Steele* (1862), 13 C. B. (N. S.) 231. See, however, *Barker* v. *Palmer* (1881), 10 Q. B. D. 9, *per* GROVE, J., holding that the right to prohibition does not oust the right to appeal. This was followed in *Sweetland* v. *Turkish Cigarette Co.*, *supra*.

(*o*) *Devonshire* (*Duke*) v. *Foott* (1871), 5 I. R. Eq. 314, where a prohibition was sought after a case stated had failed.

(*p*) *Harrington* (*Earl*) v. *Ramsay* (1853), 22 L. J. (EX.) 326. "A judge may be right on a point of law and yet have no jurisdiction" (*per* MARTIN, B., at p. 327).

(*q*) *Chesterton* v. *Farlar* (1838), 7 Ad. & El. 713; compare *Darby* v. *Cosens* (1787), 1 Term Rep. 552.

(*r*) *Butterworth and Barker* v. *Walker and Waterhouse* (1765), 3 Burr. 1689, where the consent of a parish to a faculty for an organ in the parish church was in question, and where Lord MANSFIELD, on the ground of immateriality, declined a prohibition in spite of the allegation of the encroachment of the ecclesiastical on the temporal jurisdiction. Compare *Rutland* (*Duke*) v. *Bagshaw* (1850), 14 Q. B. 869, *per* PATTESON, J., at p. 889.

(*s*) *Hunt* v. *North Staffordshire Rail. Co.* (1857), 2 H. & N. 451, where malicious prosecution was sued for under a claim for false imprisonment.

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Even when the information is laid by a stranger (*t*), it would seem that the only discretion which the superior court has to refuse a prohibition is, if it is in doubt in fact or law whether the inferior court is exceeding its jurisdiction or is acting without jurisdiction (*a*).

Proceedings partly within jurisdiction.

**290.** Where proceedings in an inferior court are partly within and partly without its jurisdiction, prohibition will lie against doing what is in excess of jurisdiction (*b*). If a plaintiff, on showing cause, elects to abandon such excess, he will be allowed to continue to proceed with the remainder of his claim in the inferior court (*c*). Where part only of a party's request for a prohibition proves to be well founded, the court ought to mould and limit the prohibition to such part (*d*).

Erroneous assumption of jurisdiction.

**291.** Where the judge of an inferior court has given himself jurisdiction by an erroneous conclusion on a point of law, prohibition will lie, but a writ will not be granted where the judge, except

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(*t*) *Worthington* v. *Jeffries* (1875), L. R. 10 C. P. 379, where this principle is laid down, the court saying that "the superior court cannot rightly refuse to enforce public order in the administration of the law" by refusing prohibition where the excess or absence of jurisdiction is brought to its notice by the plaintiff, the defendant, or a stranger. This principle was confirmed in *Ellis* v. *Fleming* (1876), 1 C. P. D. 237; see, however, *Foster* v. *Foster and Berridge* (1863), 32 L. J. (Q. B.) 312, *per* COCKBURN, C.J., at p. 314: "although the court will listen to a stranger who interferes to point out that some other court has exceeded its jurisdiction, whereby some wrong or public grievance has been sustained, yet that is not *ex debito justitiæ*, a matter upon which the court may properly exercise its jurisdiction, as distinguished from the case of the party aggrieved who is entitled to relief *ex debito justitiæ*, if he suffers from the usurpation of jurisdiction by another court"; and *per* BLACKBURN, J., at p. 316: "If we see a contempt of the Crown" (*i.e.*, by excess of jurisdiction), "that is such a case as we ought to exercise our judicial discretion upon and we ought to interfere: but a stranger has no right to require it from us." See also *Chambers* v. *Green* (1875), L. R. 20 Eq. 552, where JESSEL, M.R., followed *Foster* v. *Foster and Berridge*, *supra*, in preference to *Worthington* v. *Jeffries*, *supra*, relying on the statement of WILLES, J., in advising the House of Lords in *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239, at p. 280, "that prohibition resembles mandamus, where the Court of Queen's Bench exercises a discretion as to whether the writ shall go." In *R.* v. *Twiss* (1869), L. R. 4 Q. B. 407, COCKBURN, C.J., followed his decision in *Foster* v. *Foster and Berridge*, *supra*. In *De Haber* v. *Portugal* (*Queen*) (1851), 17 Q. B., 171, at p. 214, however, Lord CAMPBELL said: "This court, vested with the power of preventing all inferior courts from exceeding their jurisdiction to the prejudice of the Queen or her subjects, is bound to interfere when duly informed of such an excess of jurisdiction." See also *Farquaharson* v. *Morgan*, [1894] 1 Q. B. 552, C. A., *per* Lord HALSBURY, at p. 556.

(*a*) A co-respondent ordered to pay a wife's costs is a stranger for the purpose of this rule (*Foster* v. *Foster and Berridge*, *supra*).

(*b*) *Mackonochie* v. *Penzance* (*Lord*) (1881), 6 App. Cas. 424, *per* Lord BLACKBURN, at p. 444, who states that a consultation will be awarded as to the rest; *Free* v. *Burgoyne* (1826), 5 B. & C. 400; *R.* v. *Westmoreland County Court Judge* (1887), 58 L. T. 417; *Re Walsh* (1853), 1 E. & B. 383, where in a county court action part of the claim arose in Liverpool and part in Drogheda, and prohibition was granted against the cause of action arising in the latter place. See also *South Eastern Rail. Co.* v. *Railway Commissioners* (1881), 6 Q. B. D. 586, C. A., *per* Lord SELBORNE, L.C., at pp. 596, 597.

(*c*) *Ellis* v. *Fleming* (1876), 1 C. P. D. 237.

(*d*) *R.* v. *Local Government Board* (1882), 10 Q. B. D. 309, C. A., *per* BRETT L.J., at p. 320.

upon very strong grounds (*e*), for the purpose of ascertaining whether he has or has not jurisdiction, has decided a question of fact on conflicting evidence; nor will prohibition be granted when it is clear that a question which might be raised in the proceedings, and which is not within the jurisdiction of an inferior court, will not be contested in such proceedings (*f*), nor because a judge in the course of his judgment merely uses certain language relevant only to a cause of action outside his jurisdiction (*g*).

SUB-SECT. 3.—*Stage of Proceedings at which Prohibition is granted.*

When Court has exceeded jurisdiction.

**292.** Prohibition goes as soon as the inferior tribunal proceeds to apply a wrong principle of law when deciding a fact on which the jurisdiction depends (*h*). Where proceedings are pending before an inferior court, some of which are within, and others are outside, the jurisdiction of such court, no prohibition lies until such court has actually gone beyond its competency and jurisdiction (*i*). In any

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(*e*) *Elston* v. *Rose* (1868), L. R. 4 Q. B. 4, where the writ was granted because the judge had applied a wrong rule of law to the facts in deciding the meaning of "the value of the tenements." Compare *Thompson* v. *Ingham* (1850), 14 Q. B. 710, where prohibition was also granted because a question of title arose in the course of the evidence; *Brown* v. *Cocking* (1868), L. R. 3 Q. B. 672, *per* COCKBURN, C.J., at p. 675: "An inferior tribunal cannot give itself jurisdiction by deciding without evidence: on the other hand it cannot refuse to go into evidence in order to ascertain whether it has or has not jurisdiction; and if it takes upon itself jurisdiction without evidence or after refusing to go into evidence, and it turns out that there was no jurisdiction, this court will interfere by prohibition. But when the judge has gone into the inquiry and determined the question of fact, this court cannot look to see whether the decision was, on the balance of evidence, right." See also *R.* v. *Clerkenwell General Commissioners of Taxes*, [1901] 2 K. B. 879, C. A.; *Joseph* v. *Henry* (1850), 1 L. M. & P. 388, where the court declined to review a question of fact going to the jurisdiction on conflicting affidavits; *R.* v. *Lincolnshire County Court Judge* (1887), 20 Q. B. D. 167; *Ex parte M'Fee* (1853), 9 Exch. 261; *Re Aykroyd* (1847), 1 Exch. 479; *R.* v. *Bolton* (1841), 1 Q. B. 66, where it was held that affidavits would be received to show that magistrates had no jurisdiction to enter into an inquiry, but not to impeach their decision on the facts disclosed in the progress of the inquiry; affidavits would be receivable to show that the conviction would be bad on the face of the proceedings, but not that the conclusions of the justices on the facts were improper. In *Liverpool Gas Co.* v. *Everton* (1871), L. R. 6 C. P. 414, however, the court granted a prohibition to a recorder where he had given an erroneous decision on a question of fact necessary to allow the respite of an appeal; this decision, however, involved the consideration of a question of mixed law and fact. The decision of the prohibiting court on the question of fact is final, so that an adverse decision precludes the raising of the same point in further proceedings in the inferior court (*Symons* v. *Rees* (1876), 1 Ex. D. 416).

(*f*) *Dutens* v. *Robson* (1789), 1 Hy. Bl. 100. The certainty that the point in question will not be contested may be gathered from pleadings, admissions etc.

(*g*) *Chivers* v. *Savage* (1855), 5 E. & B. 697, where a judge dealing with false imprisonment used *dicta* relevant to malicious prosecution which was outside his jurisdiction. Lord CAMPBELL herein distinguished *Jones* v. *Currey* (1851), 2 L. M. & P. 474, where the objection appeared on the plaint.

(*h*) *R.* v. *Bromley Justices* (1890), 38 W. R. 253; *R.* v. *Longe* (1897), 66 L. J. (Q. B.) 278.

(*i*) *Hallack* v. *Cambridge University* (1841), 1 Q. B. 593; *R.* v. *Twiss* (1869), L. R. 4 Q. B. 407. On the same principle, where an inferior court has jurisdiction over the subject-matter of proceedings before it, no prohibition can issue before decision on the ground that such court, in giving its decision, may exceed its jurisdiction (*R.* v. *Kent Justices* (1889), 24 Q. B. D. 181). Compare

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event, where the jurisdiction of the inferior court depends on the judicial determination of facts, the writ does not lie until such court has wrongfully on such facts given itself jurisdiction (*k*).

When absence of jurisdiction is on record.

**293.** Prohibition may be applied for as soon as the absolute absence of jurisdiction is apparent on the record of the proceedings of the inferior court (*l*), without the question of jurisdiction being raised by plea or otherwise in such court (*m*).

If, however, the record shows no absence of jurisdiction, a plea is necessary to lay the foundation for a writ where there arises in the proceedings a perversion or a denial of a right (*a*), or where the defence for the first time raises a question which the court is incompetent to try (*b*); moreover, if it appear judicially to the prohibiting court that the special or inferior court will not allow a valid plea, prohibition goes without the necessity of a formal tender of a plea which is sure to be rejected (*c*).

Objection on face of proceedings.

**294.** Where the objection to the jurisdiction of an inferior court appears on the face of the proceedings (*d*), prohibition lies at any

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*Full* v. *Hutchins* (1776), 2 Cowp. 422, at p. 424, where it was said that "Where matters which are triable at common law arise incidentally in a cause where an ecclesiastical court has jurisdiction on the principal point, no prohibition will be granted unless such court tries contrary to the principle and course of the common law."

(*k*) See p. 145, *ante; Re Skipton Industrial Co-operative Society, Ltd.* v. *Prince* (1864), 33 L. J. (Q. B.) 323.

(*l*) *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239, where the want of jurisdiction appeared on the declaration. "Where it is apparent on the record that the court never had any jurisdiction, the case is ripe for decision without waiting for any further pleading" (*ibid.*, *per* Lord CRANWORTH, at p. 293). "Prohibition, where want of jurisdiction appears on the proceedings, goes at any time after service of process, and even before articles" (*ibid.*, *per* WILLES, J., at p. 291). See also *Francis* v. *Steward* (1844), 5 Q. B. 984, where prohibition was granted after a citation "because it is better for the party to apply for prohibition in the first stage than after expense is incurred"; *Wadsworth* v. *Spain* (*Queen*) (1851), 17 Q. B. 171; *De Haber* v. *Portugal* (*Queen*) (1851), 17 Q. B. 171, where no notice was taken of the proceedings by way of appearance or otherwise, except to apply for prohibition; *Buggin* v. *Bennett* (1767), 4 Burr. 2035, *per* Lord MANSFIELD, at p. 2037; and p. 147, *post.*

(*m*) Compare *London Corporation* v. *Cox*, *supra*, *per* WILLES, J., at p. 291, stating that this has been the settled practice since the stat. (1830) 1 Will. 4, c. 21 (since repealed by Statute Law Revision Act, 1891 (54 & 55 Vict. c. 67)).

(*a*) See p. 142, *ante.*

(*b*) *London Corporation* v. *Cox*, *supra*, *per* WILLES, J., at p. 276, and cases there cited; *French* v. *Trask* (1808), 10 East, 347. If the plea is successful absolute prohibition is granted, and if negatived there is a judgment of consultation, upon which the inferior court proceeds with the cause unhampered by the objection. Compare *Veley* v. *Burder* (1841), 12 Ad. & El. 265, Ex. Ch., as to collateral matter arising outside the jurisdiction. A judge of an inferior court ought to go on with an inquiry until he ascertains that if he goes any further he will exceed his jurisdiction. If he does not then stop, he renders himself liable to a prohibition (*R.* v. *Lincolnshire County Court Judge* (1887), 20 Q. B. D. 167, *per* POLLOCK, B., at p. 170.

(*c*) *London Corporation* v. *Cox*, *supra*, *per* WILLES, J., at p. 277. See *Winchester's* (*Bishop*) *Case* (1596), 2 Co. Rep. 38 a.

(*d*) *Buggin* v. *Bennett* (1767), 4 Burr. 2035, because (*per* Lord MANSFIELD at p. 2037) "all is a nullity: it is *coram non judice*"; *Full* v. *Hutchins* (1776), 2 Cowp. 422, because (*per* Lord MANSFIELD at p. 424), "*interest reipublicæ* that the ecclesiastical courts should not encroach on the jurisdiction of temporal courts";

time, even after judgment or sentence, in spite of the laches or acquiescence of the applicant (*e*); this rule applies, even if the application is merely to avoid payment of the costs of the applicant's own vexatious suit (*f*).

Objection not apparent.

**295.** Where the objection to the jurisdiction is not apparent (*g*), and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the court below, and he has thought proper, without excuse, to allow that court to proceed to judgment without setting up the objection and without moving for a prohibition in the first instance (*h*), although the jurisdiction to grant prohibition is not taken away (*i*), yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the court will decline to interpose, except perhaps upon an irresistible case and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant (*k*).

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*Bodenham* v. *Ricketts* (1836), 6 Nev. & M. (K. B.) 170; *Veley* v. *Burder* (1841), 12 Ad. & El. 265, Ex. Ch.; *Roberts* v. *Humby* (1837), 3 M. & W. 120; *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239, *per* WILLES, J., at pp. 288 and 289.

(*e*) *Farquharson* v. *Morgan*, [1894] 1 Q. B. 552, C. A., *per* DAVEY, L.J., at p. 563: "If a defective record were allowed to remain and to support a judgment, it might become a precedent." Lord DENMAN also in *Bodenham* v. *Ricketts*, *supra*, explains this rule to be for the benefit of the public, that a case may not become a precedent if allowed to stand without impeachment.

(*f*) *Paxton* v. *Knight* (1757), 1 Burr. 314.

(*g*) *London Corporation* v. *Cox*, *supra*, *per* WILLES, J., at p. 283, approved and followed in *Broad* v. *Perkins* (1888), 21 Q. B. D. 533, C. A. The law in some of the older cases that prohibition does not lie after judgment for a defect not apparent on the record seems now too sweeping; see *Full* v. *Hutchins* (1776), 2 Cowp. 422; *Stainbank* v. *Bradshaw* (1808), cited 10 East, 349, n.; *Bodenham* v. *Ricketts*, *supra*; *Ex parte Cowan* (1819), 3 B. & Ald. 123, as to which see *Combe* v. *De la Bere* (1882), 22 Ch. D. 316, C. A., *per* CHITTY, J., at p. 324.

(*h*) In the *Admiralty Case* (1610), 12 Co. Rep. 76, it was said that although the admittance of the party cannot give a jurisdiction to the court where it, of right, hath none, for that will be an encroachment on the common law, "yet when the court shall be advised that it is merely for vexation if the prohibition shall not be sued forth till after sentence, . . . unless he shall show good matter to the court to ascertain the court that this is not for vexation, it shall not be granted." In *Buggin* v. *Bennett* (1767), 4 Burr. 2035, Lord MANSFIELD thought it unreasonable for a defendant to have lain by and concealed from the court a collateral matter, and, after judgment and acquiescence in the jurisdiction of the court below, to obtain a prohibition.

(*i*) *Payne* v. *Hogg*, [1900] 2 Q. B. 43, C. A., *per* ROMER, L.J., at p. 56; *Re Knowles* v. *Holden* (1855), 24 L. J. (EX.) 223. The time when a writ of prohibition ought to issue is a question of practice merely (*London Corporation* v. *Cox*, *supra*, *per* WILLES, J., at p. 283).

(*k*) *Serjeant* v. *Dale* (1877), 2 Q. B. D. 558, where prohibition was issued several months after sentence and sequestration, although the defect did not appear on the face of the proceedings, but the applicant did not become aware, until after sentence, of the wrongful jurisdiction, and had not waived or estopped himself from complaining of the objection. In *Gould* v. *Gapper* (1804), 5 East, 345, Lord ELLENBOROUGH said that prohibition can be granted after judgment, although the defect is not apparent on the face of the proceedings, against an ecclesiastical court which has decided contrary to the principles and course of the common law, as until judgment the superior courts cannot anticipate such a judgment on the part of the ecclesiastical court.

SECT. 6. Prohibition.

Waiver by agreement or otherwise.

**296.** Parties cannot by agreement or otherwise confer jurisdiction upon or oust the jurisdiction of a court (*l*), but a jurisdiction may be contingent on the absence of an objection taken at the proper time (*m*), and an irregularity of procedure may be the subject of waiver or acquiescence so as to preclude the grant of prohibition after judgment (*n*); no waiver, however, arises by entry of appearance or other steps taken before the exact nature of the claim is ascertained (*o*). Where, however, as in cases in the county courts, there is, strictly speaking, no record (*p*), prohibition has been granted, after judgment, especially where the applicant has not had a sufficient opportunity of raising the question of jurisdiction before judgment in such court (*q*), and where at the trial of a cause a clear want of jurisdiction is for the first time made apparent, a writ of prohibition may be claimed at any time before execution is complete (*r*), but not where, as a result of the delay, judgment or execution has been satisfied and there is no longer anything to prohibit (*s*). Similarly no prohibition lies where a court has been dissolved, as in the case of a court-martial after sentence pronounced (*t*).

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(*l*) *Farquharson* v. *Morgan*, [1894] 1 Q. B. 552, C. A.; this is subject to the provisions of the Arbitration Act, 1889 (52 & 53 Vict. c. 49); see also County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 114; *Knowles* v. *Holden* (1855), 24 L. J. (EX.) 223, where prohibition lay when a question of title to land arose after, in county court proceedings, parties had consented to a reference before an arbitrator. This was followed in *R.* v. *Shropshire County Court Judge* (1887), 20 Q. B. D. 242, where a high bailiff was sued under the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 115, outside his own court; see also *Alderson* v. *Palliser*, [1901] 2 K. B. 833, C. A., where, without the prescribed affidavit, a judgment summons was issued out of the jurisdiction and a committal order made: this was held to be not an irregularity, but a want of jurisdiction appearing on the face of the proceedings which could not be waived. In *Schneider* v. *Edelstein* (1891), 35 Sol. Jo. 416, it was held that mere agreement by the parties is not sufficient to constitute waiver where the lower court has not partially or completely dealt with the matter.

(*m*) *Jones* v. *James* (1850), 19 L. J. (Q. B.) 257, *per* ERLE, J., at p. 258; *Moore* v. *Gamgee* (1890), 25 Q. B. D. 244.

(*n*) *Mouflet* v. *Washburn* (1886), 54 L. T. 16. In *Moore* v. *Gamgee*, *supra*, the defendant was held to have waived the obtaining of leave to create jurisdiction under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 74, by not objecting until the case was part heard; see also *Suckan* v. *Wiener* (1901), 17 T. L. R. 494, where there had been an undertaking to plead to the issue; *Dierken* v. *Philpot*, [1901] 2 K. B. 380, where prohibition was refused where a claim had been remitted to a county court under a master's order, which had not been appealed against.

(*o*) *Lee* v. *Cohen* (1894), 71 L. T. 824, C. A.

(*p*) *Farquharson* v. *Morgan*, *supra*, *per* DAVEY, L.J., at p. 563.

(*q*) *Marsden* v. *Wardle* (1854) 3 E. & B. 695; *Thompson* v. *Ingham* (1850), 14 Q. B. 710. In county courts, where there are no pleadings, judgment may follow almost as soon as the defence is understood. Compare *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239, *per* WILLES, J., at p. 283.

(*r*) *Heyworth* v. *London Corporation* (1884), Cab. & El. 312. In *Jones* v. *Owen* (1848), 18 L. J. (Q. B.) 8, restitution was ordered after execution where the rule had been applied for before possession given.

(*s*) *Yates* v. *Palmer* (1849), 6 Dow. & L. 283; *Re Denton* v. *Marshall* (1863), 1 H. & C. 654.

(*t*) *Re Poe* (1833), 5 B. & Ad. 681; *Grant* v. *Gould* (*Sir Charles*) (1792), 2 Hy. Bl. 69, where an attempt failed to issue the writ against the Judge Advocate.

Statutory restrictions.

**297.** Where it is by statute enacted that the defendant shall not be permitted to object to the jurisdiction of an inferior court, by any proceeding whatever, except by plea, neither the defendant nor a third person is precluded from applying for prohibition in the superior courts as soon as it is apparent that the inferior court is incompetent to try the case (*a*). If, however, there is no right of objection by plea in the inferior court, the High Court has no right to grant prohibition (*b*).

Where it is by statute enacted not only that the jurisdiction of an inferior court cannot be objected to except by plea, but further that in default of such plea the court shall have jurisdiction for all purposes, such court has a defeasible jurisdiction until the time has come for such plea, and after such time has elapsed, an unlimited jurisdiction for the purposes of the action (*c*).

Claim by Crown.

**298.** The Crown may claim a writ of prohibition at any stage of judicial proceedings (*d*), but a *supersedeas* may be awarded if prohibition has been wrongfully granted (*e*): no appeal *in formâ pauperis* lies against the Crown in these proceedings (*f*); moreover, the prerogative of the Crown to intervene whenever the rights or revenues of the Sovereign are affected is not interfered with in any way by the Judicature Acts (*g*).

SUB-SECT. 4.—*To what Tribunals granted.*

Inferior courts.

**299.** Prohibition issues to restrain all inferior courts, whether such courts be temporal, ecclesiastical, maritime or military (*h*), civil or criminal (*i*), whenever such courts take cognisance of matters

(*a*) *Jacobs* v. *Brett* (1875), L. R. 20 Eq. 1, explaining *Baker* v. *Clark* (1872), L. R. 8 C. P. 121, and disapproving of *Manning* v. *Farquharson* (1860), 30 L. J. (Q. B.) 22. *Jacobs* v. *Brett*, *supra*, was subsequently approved in *Bridge* v. *Branch* (1876), 1 C. P. D. 633; see also *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239, *per* WILLES, J., at p. 259—all cases on Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.). As to the Mayor's Court of London, see generally title MAYOR'S COURT, LONDON.

(*b*) *Hawes* v. *Paveley* (1876), 1 C. P. D. 418, C. A., where the Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 12, was in question.

(*c*) *Payne* v. *Hogg*, [1900] 2 Q. B. 43, C. A., confirming *Chadwick* v. *Ball* (1885) 14 Q. B. D. 855, C. A., which overruled *Oram* v. *Brearey* (1877), 2 Ex. D. 346. The court in question was the Salford Hundred Court, regulated by Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.). No prohibition lies after judgment by default, even though by such default no opportunity of raising the question of jurisdiction ever arises (*Payne* v. *Hogg*, *supra*). As to the Salford Hundred Court generally, see title COURTS, Vol. IX., p. 197.

(*d*) *Broad* v. *Perkins* (1888), 21 Q. B. D. 533, C. A., at p. 535. In Bac. Abr. tit. Prohibition, it is said that the King may sue for a prohibition, though the plea be between two common persons, because the suit is in derogation of his crown and dignity.

(*e*) *Anon.* (1684), 1 Vern. 301; see also *R.* v. *Farrant* (1887), 20 Q. B. D. 58, *per* STEPHEN, J., at p. 62.

(*f*) *Clements* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 482, C. A., at p. 486.

(*g*) *A.-G.* v. *Constable* (1879), 4 Ex. D. 172; followed in *Stanley* (*Lord*) v. *Wild & Son*, [1900] 1 Q. B. 256, C. A.

(*h*) *Grant* v. *Gould* (*Sir Charles*) (1792), 2 Hy. Bl. 69, where Lord LOUGHBOROUGH, C.J., at p. 101, says that courts-martial (military and naval), courts of admiralty, and courts of prize are all subject to prohibition. Compare *Re Poe* (1833), 5 B. & Ad. 681.

(*i*) *R.* v. *Herford* (1860), 29 L. J. (Q. B.) 249; *R.* v. *D'Eyncourt* (1888), 21

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outside their jurisdiction, and lies so long as such courts act, or purport to act, in the exercise of judicial functions and in the course of judicial proceedings (*k*); but a proceeding does not become judicial merely by reason of the party complained of being invited to attend to give explanation (*l*). Where an indictment lies, prohibition is not a remedy by which a public body can be restrained from the commission of a nuisance (*m*).

Meaning of inferior court.

**300.** A court is an inferior court for the purpose of prohibition whenever its jurisdiction is limited (*n*). Thus, prohibition may be granted to quarter sessions (*o*), to petty sessions (*p*), to a coroner from holding an inquest (*q*), to the Railway Commissioners (*r*), to the Tithe Commissioners (*s*), to the Income Tax Commissioners (*a*), to the Comptroller-General of Patents (*b*), and to practically all local courts, such as the Salford Hundred Court and the Liverpool Court of Passage (*c*), as well as to the Mayor's Court of London and county courts, including the City of London Court (*d*). It lies against the

Q. B. D. 109. The judges and justices of the Central Criminal Court are not an inferior court; see *R.* v. *Central Criminal Court Justices* (1883), 11 Q. B. D. 479; and title, COURTS, Vol. IX., p. 88.

(*k*) Prohibition has been granted to a "pretended court," such as a court of honour (*Chambers* v. *Jennings* (1702), 2 Salk. 553).

(*l*) *Ex parte Death* (1852), 18 Q. B. 647, where it was held that prohibition does not lie against a vice-chancellor of a university making an order to discommune, as this is not a judicial proceeding in his court. See also *R.* v. *London County Council*, [1893] 2 Q. B. 454, C. A., as to whether the determination as to the parish to which a disused churchyard belongs is a judicial proceeding.

(*m*) *R.* v. *Dorset Justices* (1812), 15 East, 594.

(*n*) See *James* v. *South Western Rail. Co.* (1872), L. R. 7 Exch. 287, Ex. Ch., *per* WILLES, J., at p. 290; and compare *Laughton* v. *Taylor* (1840), 6 M. & W. 695, where it was held that the Borough Court of Liverpool was an inferior court; *Foster* v. *Foster and Berridge* (1863), 32 L. J. (Q. B.) 312, where it was doubted if prohibition lay (before the Judicature Acts) against the Divorce Court.

(*o*) *Ex parte Everton Overseers* (1871), L. R. 6 C. P. 245; *Liverpool Gas Co.* v. *Everton* (1871), L. R. 6 C. P. 414; *R.* v. *London County Justices and London County Council*, [1893] 2 Q. B. 476, C. A.

(*p*) *Re Briton Medical and General Life Association* (1888), 39 Ch. D. 61; *R.* v. *Bromley Justices* (1889), 38 W. R. 253. See, however, *R.* v. *Tolhurst, Ex parte Farrell*, [1905] 2 K. B. 478, where Lord ALVERSTONE, C.J., doubted if prohibition were the right remedy against licensing justices.

(*q*) *R.* v. *Herford* (1860), 29 L. J. (Q. B.) 249.

(*r*) *South Eastern Rail. Co.* v. *Railway Commissioners* (1881), 6 Q. B. D. 586, C. A.; *R.* v. *Railway Commissioners and Distington Iron Co.* (1889), 22 Q. B. D. 642.

(*s*) *Re Ystradgunlais Tithe Commutation* (1844), 8 Q. B. 32; *Re Appledore Tithe Commutation* (1845), 8 Q. B. 139.

(*a*) *R.* v. *Clerkenwell (General Commissioners of Taxes)*, [1901] 2 K. B. 879, C. A.

(*b*) *Re Hall* (1888), 21 Q. B. D. 137.

(*c*) *Whitehead* v. *Butt* (1891), 7 T. L. R. 609 (Salford Hundred Court); *The Teresa* (1894), 71 L. T. 342 (Liverpool Court of Passage).

(*d*) See the cases cited in this title, and cases under titles COUNTY COURTS, Vol. VIII., pp. 611—614; COURTS, Vol. IX., pp. 11 *et seq.* The jurisdiction of the Mayor's Court, London, is specially dealt with in *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239, and *Read* v. *Brown* (1888), 22 Q. B. D. 128, C. A.; see also title MAYOR'S COURT, LONDON; and that of the City of London Court in *Kutner* v. *Phillips*, [1891] 2 Q. B. 267; and see title COUNTY COURTS, Vol. VIII., p. 412.

vice-chancellor's court at the universities (*e*), and against every ecclesiastical court, even probably against the Privy Council, when sitting as a court of appeal in ecclesiastical matters (*f*).

Courts invested with High Court powers.

**301.** Where, by statute, an inferior court is, for the performance of certain duties, invested with the powers and jurisdiction of the High Court, no prohibition will be granted (*g*); the same rule applies where the judge of an inferior court, by statute, acts as an arbitrator, and not as a judge with a special jurisdiction (*h*).

Inferior courts of appeal.

**302.** A prohibition will be granted by the Supreme Court of Judicature to an inferior court of appeal, even after the suit has been remitted to the court below, if costs awarded in the appellate court are still being applied for (*i*); a judgment removed to another inferior court for enforcement may be set aside and prohibition issued to prevent further proceedings, if such judgment was obtained in a matter where the original court had no jurisdiction (*k*), but this will not be granted if the objection relates to a mere irregularity in such inferior court (*l*).

Non-judicial tribunals.

**303.** Prohibition will not issue to any person (*m*), or body of persons, who may be acting judicially but not as a judicial tribunal (*n*), nor against the ministerial or executive acts of the Government (*o*); but where by Act of Parliament a body of persons have the power of imposing an obligation upon individuals (who are parties to the proceedings), the High Court will exercise as widely as possible the power of controlling such bodies, if those

(*e*) *Re Oxford University and Taylor* (1841), 1 Q. B. 952.

(*f*) *Ex parte Smyth* (1835), 3 Ad. & El. 719; *Mackonochie* v. *Penzance* (*Lord*) (1881), 6 App. Cas. 424, where the question was raised, but Lord BLACKBURN alone pronounced specifically in favour of prohibition. Compare *Combe* v. *Edwards* (1878), 3 P. D. 103, *per* Lord PENZANCE, at p. 119.

(*g*) *Re New Par Consols* (No. 2), [1898] 1 Q. B. 669, C. A., where the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), was in question. See also *Skinner* v. *Northallerton County Court Judge*, [1899] A. C. 439, where *certiorari* was applied for to remove to the Queen's Bench an order made by the county court under its bankruptcy jurisdiction.

(*h*) See *Tunbridge Wells Corporation* v. *National Telephone Co.* (1900), 83 L. T. 525.

(*i*) *Darby* v. *Cosens* (1787), 1 Term Rep. 552, where prohibition was granted to the Court of Arches as well as to the lower court.

(*k*) *Bridge* v *Branch* (1876), 1 C. P. D. 633, holding that the superior court cannot be bound to enforce a bad judgment.

(*l*) *Williams* v. *Bolland* (1876), 1 C. P. D. 227, where it was held, following *Simons* v. *de Wints* (*Count*) (1840), 8 Dowl. 646, that the superior court will decline to enter into the merits.

(*m*) *Ex parte Simon* (1888), 4 T. L. R. 754, C. A., where prohibition was refused against the Attorney-General acting in pursuance of the Patent Acts.

(*n*) *Chabot* v. *Morpeth* (*Lord*) (1850), 15 Q. B. 446, where an attempt failed to prohibit the Commissioners of Woods from paying money, assessed by a sheriff's jury, into the Bank of England, as the sheriff could not be prohibited, being *functus officio*. See also *R.* v. *London County Council*, [1893] 2 Q. B. 454, C. A.; *Re Grosvenor and West End Railway Terminus Hotel Co., Ltd.* (1897), 76 L. T. 337, where prohibition was refused both against the Board of Trade and against their inspector acting under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 56, as the inquiry was not judicial and had nothing in the nature of a judicial determination.

(*o*) In such a case the remedy would be by *certiorari* (*ibid.*). As to *certiorari*, see p. 155, *post*.

SECT. 6. Prohibition.

bodies attempt to exceed the jurisdiction prescribed by such act (*p*), or usurp a jurisdiction of judicial character (*q*).

SUB-SECT. 5.—*Procedure and Costs.*

Who may grant.

**304.** A writ of prohibition can be granted by any judge and by any division of the High Court of Justice (*r*), but a refusal by a judge or division of the Supreme Court, though appealable (*s*), prevents an application to another judge or court of co-ordinate jurisdiction (*t*) except upon new grounds (*u*).

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(*p*) *R.* v. *Local Government Board* (1882), 10 Q. B. D. 309, C. A., *per* BRETT, L.J., at p. 321. Whether prohibition lies to the Local Government Board is still doubtful. In *Re Grosvenor and West End Railway Terminus Hotel Co., Ltd.* (1897), 76 L. T. 337, the question of prohibition issuing against the Board of Trade was not decided. In *R.* v. *Clerkenwell* (*General Commissioners of Taxes*), [1901] 2 K. B. 879, C. A., prohibition was refused because the commissioners had not gone wrong in the finding of any fact preliminary to giving themselves jurisdiction.

(*q*) It is doubtful if a provisional order made by the Irish Local Government Board can be restrained by prohibition (*Re Local Government Board, Ex parte Kingstown Commissioners* (1885), 18 L. R. Ir. 509, C. A., *per* FITZGIBBON, L.J., at p. 514); compare *R.* v. *Hastings Local Board of Health* (1865), 6 B. & S. 401, where it was held that a provisional order could not be removed by *certiorari*.

(*r*) *The Recepta*, [1893] P. 255, C. A., *per* BOWEN, L.J., at pp. 262, 263: "Since the Judicature Act, by which all the courts were merged together, writs for prohibition are usually moved for from the Crown side of the Queen's Bench Division, but there is nothing necessarily confirming prohibition to Crown Practice." In this case it was held that a vacation judge granting prohibition in an admiralty matter acted as a judge of the Admiralty Division. Compare *Jones* v. *Slee* (1886), 32 Ch. D. 585, C. A.; *R.* v. *London County Justices and London County Council*, [1894] 1 Q. B. 453, C. A., where LOPES, L.J., at p. 457, said that prohibition was not a jurisdiction belonging any more to the Queen's Bench than to the other courts; the Queen's Bench, Exchequer, and Common Pleas, as well as the Court of Chancery, all had concurrent jurisdiction and power to inhibit inferior tribunals; see also *Mackonochie* v. *Penzance* (*Lord*) (1881), 6 App. Cas. 424, *per* Lord BLACKBURN, at p. 443; *Wright* v. *Cattell* (1850), 13 Beav. 81. For prohibition in the Chancery Division see *Hedley* v. *Bates* (1880), 13 Ch. D. 498; and in the Admiralty Division see *The Teresa* (1894), 71 L. T. 342. In *Re Briton Medical and General Life Association* (1888), 39 Ch. D. 61, the Lord Chancellor gave a special direction assigning an application to Mr. Justice Stirling for the purposes of R. S. C., Ord. 5, r. 9, and R. S. C., Ord. 49, r. 4.

(*s*) An appeal lies from a judge in chambers to a divisional court (*Watson* v. *Petts*, [1899] 1 Q. B. 54, C. A.), as prohibition is not a matter of "practice or procedure," and from a divisional court to the Court of Appeal without leave (*Lister* v. *Wood* (1889), 23 Q. B. D. 229, C. A.; *Barton* v. *Titchmarsh* (1880), 42 L. T. 610, C. A.), and from the Court of Appeal to the House of Lords (Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 3). A writ of prohibition may be set aside by a judge in chambers (*Amstell* v. *Lesser* (1885), 16 Q. B. D. 187).

(*t*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 132, which provides that no other court or judge shall grant a writ of prohibition when the High Court or a judge thereof shall have already refused such application, but this refusal does not affect the right of appealing from court or judge on a fresh application on new grounds. Though this section only applies to county courts, it is apprehended that, since the right of appeal given by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19, the High Court would apply the same rule on applications for prohibition to other inferior courts, for by the right of appeal the old practice of multiplying applications to co-ordinate courts or judges has been stopped; compare *The Recepta*, [1893] P. 255, C. A., *per* Lord ESHER, M.R., at p. 260, and *per* BOWEN, L.J., at p. 262.

(*u*) In *Bodenham* v. *Ricketts* (1836), 6 Nev. & M. (K. B.) 537, however, where a rule *nisi* for a prohibition had been discharged, the court would not allow the application to be reopened on the strength of affidavits containing further evidence.

An application for the writ (*v*) in civil proceedings can be made to a judge in chambers, *ex parte* or by summons, or by motion to a divisional court (*w*); in criminal proceedings applications must be made to a divisional court, except during the Long Vacation, when a judge in chambers has jurisdiction (*x*).

Against whom.

**305.** The application for a rule may be made against the party, or the judge to be prohibited, or both, and in modern practice it is made, as a matter of form, against the party and the court, but it is usually the party, and very rarely the court, that shows cause against the rule (*a*). But when the court sought to be prohibited is a county court, the judge of such court must not be served with notice of the application, and will not, except by order of a judge of the High Court, be required to appear or be heard thereon, and will not, except by such order, be liable to an order for costs (*b*).

Affidavit.

**306.** Prohibition will not be granted without an affidavit in support of the application (*c*), which should be intituled in the court (*d*), but not in any cause (*e*).

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(*v*) Crown Office Rules, 1906, rr. 70, 71; though the motion is for a rule *nisi* the order can for special circumstances be made absolute on an *ex parte* application (*ibid.*, p. 71). Leave must be obtained to issue the summons (*ibid.*, r. 266).

(*w*) *King* v. *Charing Cross Bank* (1889), 24 Q. B. D. 27; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 128. Prohibition is beyond a master's jurisdiction (R. S. C., Ord. 54, r. 12; and see Ord. 68, r. 2).

(*x*) An appeal from a judge at chambers herein is not a matter of practice and procedure within the Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (4), and an appeal from such judge lies in the first instance to a divisional court (*Watson* v. *Petts*, [1899] 1 Q. B. 54).

(*a*) *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239, *per* WILLES, J., at p. 280. Instances of appeal by the prohibited judge are *Stonor* v. *Fowle* (1887), 13 App. Cas. 20, and *Combe* v. *De la Bere* (1882), 22 Ch. D. 316, C. A., where it was held that there was no power to refuse costs to a judge who had appeared and succeeded on an attempt to prohibit proceedings in his court.

(*b*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 128; by this section prohibition is put on the same footing as an appeal duly brought from the judge's decision.

(*c*) Stat. (1830) 1 Will. 4, c. 21, which, though repealed by the Statute Law Revision Act, 1891 (54 & 55 Vict. c. 67), apparently still governs the practice; see *Caton* v. *Burton* (1775), 1 Cowp. 330, *per* Lord MANSFIELD: "The party shall not stop the proceedings of a court of justice upon a mere suggestion without an affidavit"; *Buggin* v. *Bennett* (1767), 4 Burr. 2035, where the application was refused as there was "a mere suggestion" only before the court. For the older cases, where the practice was not settled and it was thought that a plea on the record was sufficient, see *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239, *per* WILLES, J., at pp. 285, 291.

(*d*) By the Crown Office Rules, 1906, r. 6, the title of affidavit should be "In the High Court of Justice, King's Bench Division," but as prohibition can be granted by any division of the High Court (see p. 152, *ante*), this title must be varied to suit the division in which the application is made. For Chancery applications, see Daniell's Chancery Practice, 7th ed., Vol. II., chap. 25; Seton's Judgments and Orders, 6th ed., Vol. I., chap. 33.

(*e*) *Ex parte Evans* (1842), 2 Dowl. (N. S.) 410, where it was held that affidavits should not be intituled in any cause or "in prohibition"; *R.* v. *Plymouth and Dartmoor Rail. Co.* (1889), 37 W. R. 334, where the affidavits were not intituled according to the rules, and leave was refused to reswear or amend the affidavits, the rule being discharged without prejudice to a further application. See, however, *contrà*, *Wallace* v. *Allen* (1875), L. R. 10 C. P. 607, where it was held no

SECT. 6. Prohibition. Pleadings.

**307**. It is always in the discretion of the court to say whether a plaintiff in prohibition shall be ordered to plead (*f*); when the court is clear both in fact and in law that the inferior court is clearly acting in excess of or without jurisdiction, a writ of prohibition will issue without pleadings (*g*): this rule does not apply to prohibition against a county court, where an application for a writ is finally disposed of by order, and no further proceedings are allowed (*h*).

Injunction.

**308**. Where the High Court has before it for adjudication an action between parties, who in the same matter are proceeding before an inferior court which is acting beyond its jurisdiction, the High Court may (*i*) in lieu of prohibition restrain the parties from continuing the proceedings in the inferior court (*k*).

Costs.

**309**. The court, whether granting or refusing prohibition, has a discretion to award costs to the successful party (*l*), but cannot deal with the costs in the inferior court (*m*).

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objection that the title of the affidavit was "In the matter of a prohibition against the court below and in the matter of an action commenced in such court between A. and B."; *Breedon* v. *Capp* (1845), 9 Jur. 781, where affidavits were allowed to be read in answer to a rule *nisi* intituled "In the Queen's Bench between A. plaintiff and B. defendant in prohibition."

(*f*) "Pleadings in prohibition" take the place of the old declaration, and all proceedings in prohibition are now assimilated to an ordinary action for damages by R. S. C., Ord. 68, r. 3. For a modern case of pleadings in prohibition, see *Stileman-Gibbard* v. *Wilkinson*, [1897] 1 Q. B. 749. Even before the Judicature Acts a defendant in prohibition was entitled to plead several pleas (*Hall* v. *Maule* (1835), 4 Ad. & El. 283). As to form of pleadings see *London Joint Stock Bank* v. *London Corporation* (1875), 1 C. P. D. 1; *South Eastern Rail. Co.* v. *Railway Commissioners* (1880), 41 L. T. 760.

(*g*) *Worthington* v. *Jeffries* (1875), L. R. 10 C. P. 379. It was formerly thought that the defendant in prohibition was entitled to insist on a declaration (*Remington* v. *Dolby* (1844), 9 Q. B. 176; *St. John's College* v. *Todington* (1757), 1 Burr. 158, at p. 198). The party applying is not entitled, as of right, to declare (*ibid.*; *Re York* (*Dean*) (1841), 2 Q. B. 1). The court may order pleadings if an important or difficult point of law is involved (*Gare* v. *Gapper* (1803), 3 East, 472; *De Haber* v. *Portugal* (*Queen*) (1851), 17 Q. B. 171, at p. 220; *White* v. *Steel* (1861), 5 L. T. 449), but will hesitate so to do, as an appeal lies against the judgment of the divisional court (*Serjeant* v. *Dale* (1877), 2 Q. B. D. 558, at p. 568; *Toomer* v. *London, Chatham and Dover Rail. Co.* (1877), 2 Ex. D. 450, at p. 458; and *Martin* v. *Mackonochie* (1878), 3 Q. B. D. 730, at p. 783). As to when pleadings will be ordered, see title PRACTICE AND PROCEDURE.

(*h*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 128.

(*i*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (7).

(*k*) *Hedley* v. *Bates* (1880), 13 Ch. D. 498, followed in *Great Western Rail. Co.* v. *Waterford and Limerick Rail. Co.* (1881), 17 Ch. D. 493, C. A., and explained in *Stannard* v. *St. Giles, Camberwell, Vestry* (1882), 20 Ch. D. 190, C. A.; an injunction cannot be granted in lieu of prohibition, unless the High Court is already seised of the case otherwise (*ibid.* at p. 197). For the exercise of an injunction *inter partes*, see also *The Teresa* (1894), 71 L. T. 342. As to injunction generally, see title INJUNCTION.

(*l*) *R.* v. *London County Justices and London County Council*, [1894] 1 Q. B. 453, C. A.; *Wallace* v. *Allen* (1875), L. R. 10 C. P. 607; *R.* v. *Jones*, [1894] 2 Q. B. 382; see also Judicature Act, 1890 (53 & 54 Vict. c. 44), ss. 4, 5; R. S. C., Ord. 68, r. 2. For refusal of prohibition with costs, see *Lloyd* v. *Jones* (1848), 6 C. B. 81. In a new trial in prohibition, the court has the same discretion as to costs as in other cases (*Craven* v. *Sanderson* (1838), 7 Ad. & El. 880, at p. 897). The cases under stat. (1830) 1 Will. 4, c. 21, since repealed, are now apparently irrelevant, in spite of Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59), s. 5.

(*m*) *Tessimond* v. *Yardley* (1833), 5 B. & Ad. 458; *White* v. *Steel* (1862), 32

Where a rule for a prohibition is made absolute with costs, the court may order such costs to be paid by the plaintiff's solicitor, but the order will not be made unless the rule has been moved for in that form and the solicitor has had an opportunity of showing cause (*n*).

## SECT. 7.—*Certiorari.*

### SUB-SECT. 1.—*The Writ of Certiorari and Proceedings in the Nature of Certiorari.*

Nature of the writ.

**310.** The writ of *certiorari* issues out of a superior court (*a*), and is directed to the judge or other officer of an inferior court of record (*b*). It requires that the record of the proceedings in some cause or matter depending before such inferior court shall be transmitted into the superior court to be there dealt with, in order to insure that the applicant for the writ may have the more sure and speedy justice. It may be had in either civil or criminal proceedings. The object of the writ, particularly in civil proceedings, is to give relief from some inconvenience supposed, in the particular case, to arise from a matter being disposed of before an inferior court less capable than the High Court of rendering complete and effectual justice (*c*).

Orders in the nature of *certiorari*.

**311.** The transmission of records from certain courts is in some cases effected by orders in the nature of *certiorari*.

Indictments are so removable from assizes and from the Central Criminal Court into the King's Bench Division (*d*); for the assize courts and the Central Criminal Court are branches of the High Court of Justice (*e*); and the High Court has power to direct its own officers in any branch by a simple order without writ (*f*). But this order is obtained in the same manner, and is subject to the same conditions, as the writ itself (*g*).

Indictments found before justices in London and the home

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L. J. (C. P.) 1, where an attempt was unsuccessfully made to recover the costs in the inferior court by way of damages. In county courts the judge of such court, when striking out an action or matter for want of jurisdiction, has full jurisdiction to award costs (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 114).

(*n*) See memorandum to *Robinson* v. *Emanuel* (1874), L. R. 9 C. P. 414, at p. 751; *Rogers* v. *London, Chatham, and Dover Rail. Co.* (1877), 26 W. R. 192 (both cases in the Mayor's Court, London). See also title SOLICITORS.

(*a*) For superior and inferior courts, see title COURTS, Vol. IX., pp. 9, 10.

(*b*) As to courts not of record, see p. 168, *post*.

(*c*) See 3 Bl. Com. 636. The record is not invariably required to be transmitted to the same branch of the superior court as that which directs the issue of the writ; for the King's Bench Division may direct the record of an indictment found in an inferior court to be transmitted directly into the Central Criminal Court for trial (Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), s. 16; and see Central Criminal Court Act, 1856 (19 & 20 Vict. c. 16), s. 3).

(*d*) *R.* v. *Dudley* (1884), 14 Q. B. D. 273, 280; and see *Skinner* v. *Northallerton County Court Judge*, [1898] 2 Q. B. 680, C.A., affirmed [1899] A. C. 439.

(*e*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16.

(*f*) *R.* v. *Dudley, supra*. This order is, however, granted in the same manner and upon the same grounds as the writ (Crown Office Rules, 1906, r. 17); see p. 203, *post*.

(*g*) Crown Office Rules, 1906, r. 17, and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 349.

SECT. 7. Certiorari.

counties may be removed for trial into the Central Criminal Court by an order made either by the King's Bench Division of the High Court of Justice, or by any judge of the Supreme Court on the commission of the Central Criminal Court, or by the recorder of the city of London (*h*).

Orders of quarter sessions are removed into the High Court, for the purpose of being enforced, by such an order and not by the writ itself (*i*).

Judgments for £20 or upwards of local courts of record to which the Borough Courts of Record Act, 1872 (*k*), has been applied, and any judgments of the Salford Hundred Court of Record (*l*), may be so removed into the High Court for the purpose of execution.

Where in answer to an action brought in a county court a counterclaim is put forward involving matters beyond the jurisdiction of the county court, the High Court, or a judge thereof, may order the whole proceedings to be transferred to the High Court without any writ of *certiorari;* and the proceedings so removed continue in the High Court as though they had been originally commenced there (*m*).

Transmitting records.

**312.** In some cases the records of an inferior court may be transmitted to the superior court without either the writ of *certiorari* or any order of the superior court. Thus, indictments found at courts of quarter sessions may be transmitted by the justices to the assizes for the county in which such indictments are found (*n*), and when a special case has been granted by justices of the peace (*a*) or by quarter sessions (*b*), the proceedings may be transmitted to the High Court (*c*).

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(*h*) Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), s. 16; *R.* v. *Sill* (1852), Dears. C. C. 10; and see p. 158, *post.*

(*i*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 18; *Hawker* v. *Field* (1850), 20 L. J. (M. C.) 41; and see p. 164, *post.*

(*k*) 35 & 36 Vict. c. 86. See title COURTS, Vol. IX., p. 136, and p. 163, *post.*

(*l*) Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), s. 88. In this case the judgment becomes a judgment of the High Court in the same way as if it had been removed by *certiorari.* Under the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 48, execution in the High Court, in any manner, may be obtained on a judgment of the Mayor's Court without any writ of *certiorari* or any order; and under the Liverpool Court of Passage Act, 1838 (1 & 2 Vict. c. xcix.), s. 3, execution in the High Court by *fi. fa.* on a judgment of the Court of Passage may be obtained by an order of a master of the High Court; but in these cases the judgment itself is not removed into the High Court. For these Courts generally, see titles COURTS, Vol. IX., pp. 173, 197; MAYOR'S COURT, LONDON.

(*m*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 90.

(*n*) *R.* v. *Wetherell* (1819), Russ. & Ry. 381. Grand jurors at sessions may find true bills on indictments which the sessions have no jurisdiction to try (Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38), s. 2). When they do so a judge of assize for the county in which such indictments are found may issue a writ of *certiorari* to remove them (*ibid.*), or the justices may transmit such indictments to the assizes without *certiorari.*

(*a*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 10; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33.

(*b*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 40.

(*c*) *Certiorari* is not, however, taken away; and the writ may be obtained when it is thought necessary, see p. 165, *post.* As to special cases generally, see title MAGISTRATES.

SUB-SECT. 2.—*Purposes for which Certiorari is granted (d).*

(i.) *Certiorari to remove for Trial.*

(a) *Civil Actions.*

Meaning of "fit to be tried."

**313.** In certain cases there is a common law right to remove actions for trial from inferior courts (*e*), but in the great majority of cases an action can only be removed when in the opinion of a judge of the High Court, it is fit to be tried in the High Court. An action may be fit to be tried in the High Court, or it may be desirable that it should be so tried, where difficult points of law are involved (*f*); but where there is an appeal from the lower court to the King's Bench Division *certiorari* is not readily granted on this ground (*g*); or where there is reason to suppose that a fair trial could not be secured in the court below (*h*). An alternative course is now provided in the case of county courts, for where prejudice is likely to exist, there is power to change the venue from one county court to another (*i*). The circumstance that substantial fraud is charged is not in itself a sufficient ground for removing an action from an inferior court (*a*).

Equitable actions.

**314.** Actions of an equitable nature are removable from local courts of record which possess equitable jurisdiction where it is shown that the applicant cannot have justice or complete justice in the inferior court, or that the action is beyond the jurisdiction of the inferior court (*b*). An action on the equity side of the Mayor's

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(*d*) Applications for *certiorari* for the argument of demurrers (see p. 158, *post*), for judgment upon indictments (see p. 159, *post*), for sentence after judgment on indictments (see p. 164, *post*), to estreat recognisances (see p. 164, *post*), for outlawry (see p. 165, *post*), to remove a special case (see p. 165, *post*), to remove depositions on applications for bail (see p. 167, *post*), and for the use of a record in evidence (see p. 168, *post*), are now rare. *Certiorari* for other purposes, referred to in Fitzherbert's Natura Brevium and Hale, P. C., has become entirely obsolete. *Certiorari* in aid of error is perhaps not entirely obsolete; for error still lies from the Court of Appeal to the House of Lords (*Justice* v. *Mersey Steel Co.* (1876) 1 C. P. D. 575,577), though it has been abolished in other cases (see p. 160, *post*). As to whether the record itself was to be returned or only an exemplification, the practice of the superior courts seems to have varied; but in the case of *certiorari* in aid of error to the House of Lords an exemplification was always sufficient (*Wilkes* v. *R.* (1768), Macqeen, Practice of the House of Lords, 401; *Atkinson* v. *R.* (1785), *ibid.* 402).

(*e*) As to inferior courts, see title COURTS, Vol. IX., p. 11.

(*f*) *Rees* v. *Williams* (1851), 21 L. J. (EX.) 24; *Potter* v. *Great Western Colliery Co., Ltd.* (1894), 10 T. L. R. 380, C. A.; *Staples* v. *Accidental Death Insurance Co.* (1861), 10 W. R. 59; *Longbottom* v. *Longbottom* (1852), 8 Exch. 203; *Hunt* v. *Great Northern Rail. Co.* (1851), 2 L. M. & P. 268; but see *Munday* v. *Thames Ironworks Co.* (1882), 10 Q. B. D. 59; *Soloman* v. *London, Chatham and Dover Rail. Co.* (1861), 10 W. R. 59.

(*g*) *Soloman* v. *London, Chatham and Dover Rail. Co., supra.*

(*h*) *Bates* v. *Warner* (1889), 5 T. L. R. 582, C. A.; *Symonds* v. *Dimsdale* (1848), 2 Exch. 533; *Potter* v. *Great Western Colliery Co., supra.*

(*i*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 85. See title COUNTY COURTS, Vol. VIII., p. 482.

(*a*) *Simpson* v. *Shaw* (1886), 56 L. J. (Q. B.) 92; *Boize* v. *Edwards* (1889), 5 T. L. R. 341.

(*b*) *Certiorari* to inferior courts of equity jurisdiction was obtained by *certiorari* bill in Chancery. This bill alleged that the applicant could not or was not likely to obtain justice in the inferior court (*Stephenson* v. *Houlditch*

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Court can only be removed into the High Court by a special order in the nature of *certiorari* made by a judge of the High Court, which is not to be made if such judge considers that the case is fit to be tried in the Mayor's Court (*c*).

(b) *Indictments.*

Removal of indictments.

**315.** *Certiorari* lies at common law (*d*) to remove indictments found before inferior courts of criminal jurisdiction into the High Court for trial. Coroners' inquisitions are a species of indictment (*e*), and are removable in the same manner. Presentments found before commissioners of sewers may be removed for trial (*f*). Indictments may be removed not only for trial upon issues of fact, but also for the hearing of demurrers (*g*), but they are now rarely removed for this purpose.

Removal into Central Criminal Court.

**316.** Indictments removed for trial are ordinarily removed into the King's Bench Division of the High Court of Justice; but indictments found at any place beyond the jurisdiction of the Central Criminal Court may be removed directly into the Central Criminal Court for trial there (*h*).

Indictments found before justices for the cities of London and Westminster, the liberty of the Tower, the borough of Southwark, or the counties of Middlesex, Essex, Kent, and Surrey, may also be

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(1704), 2 Vern. 491; *Addison* v. *Hindmarsh* (1686), 1 Vern. 442). The bill was supported by affidavit, and the applicant was bound in a penal sum of £100, conditioned to be void if the bill contained matter sufficient to bear *certiorari;* and if the applicant should prove the suggestions of the bill within fourteen days, application for the order for the writ was made *ex parte* upon filing the bill and the affidavits verifying it (see further as to the practice *Jones* v. *Hey* (1869), 17 W. R. 996; see also *Hilton* v. *Lawson* (1560), Cary, 68; *Sowton* v. *Cutler* (1675), 2 Rep. Ch. 57; *Portington* v. *Tarbock* (1683), 1 Vern. 177; *Strode* v. *Little* (1682), 1 Vern. 59). Where want of jurisdiction is apparent on the face of the proceedings, the writ might be granted at once without reference to the master in chambers (*Jones* v. *Hey, supra; Tracy* v. *Open Stock Exchange* (1870), L. R. 11 Eq. 556).

The practice of the Chancery Division now corresponds to that of the King's Bench Division, and the writ is obtained by summons or motion without bill or bond (*Re Royal Liver Friendly Society* (1887), 35 Ch. D. 332). But it is conceived that the jurisdiction of the High Court to remove equity proceedings from local courts of record is the same as that which was formerly possessed by the Court of Chancery, and may be exercised on the same grounds.

(*c*) Mayor's Court London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 20; and see title MAYOR'S COURT, LONDON.

(*d*) The right to remove an indictment into the High Court was formerly absolute on the part of the prosecutor (Com. Dig. tit. Certiorari, p. 335); but it was probably never absolute on the part of the defendant.

(*e*) *R.* v. *Ingham* (1864), 5 B. & S. 257. See title CORONERS, Vol. VIII., p. 283.

(*f*) *R.* v. *Baker* (1859), 28 L. J. (Q. B.) 377.

(*g*) 2 Hale, P. C. 210. The points which could be raised on demurrer may also be raised on motion to quash, either in the court below or on *certiorari.*

(*h*) Central Criminal Court Act, 1856 (19 & 20 Vict. c. 16), s. 3; Crown Office Rules, 1906, r. 19; and see *R.* v. *Palmer* (1856), 5 E. & B. 1024; *R.* v. *Ruxton* (1862), 11 W. R. 209; *Re Moross* (1891), 7 T. L. R. 507. The trial is by an ordinary jury of the Central Criminal Court. Indictments may be removed directly into the Central Criminal Court also under the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 50, and under the Jurisdiction in Homicides Act, 1862 (25 & 26 Vict. c. 65).

removed directly into the Central Criminal Court for trial there by an order in the nature of *certiorari*. This order may be made either by the King's Bench Division, or by a judge of the High Court who is on the commission of oyer and terminer of the Central Criminal Court, or by the recorder of the city of London (*i*).

Removal from sessions.

**317.** Indictments found at any sessions in a county in matters which are beyond the jurisdiction of the sessions to try may be removed directly into the assize court of that county. The writ in this case can only be issued by a judge of the High Court acting as judge of assize for the county in question (*j*).

Trial after removal.

**318.** When indictments are removed for trial into the King's Bench Division, the trial takes place, in the absence of any further order, as a *nisi prius* record at the next assizes for the county in which the indictment was found, or, if it was found in London or Middlesex, at the sittings of the High Court of Justice (*k*).

(ii.) *Certiorari for Judgment on Indictment.*

*Certiorari* for judgment.

**319.** *Certiorari* lies at common law to remove an indictment and the proceedings thereon into the High Court for judgment, when a special verdict has been returned in the court below (*l*), or when

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(*i*) Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), s. 16. Inasmuch as indictments are removed under this Act, not by the writ of *certiorari* itself, but by an order in the nature of the writ, an application to remove may be granted even in cases in which *certiorari* is taken away (*R.* v. *Sill* (1852), Dears. C. C. 10); see p. 178, *post*). The authority given by the Act in no way affects the authority of the High Court to remove indictments from the Central Criminal Court into the King's Bench Division (*R.* v. *Hawdon* (1841), 9 Dowl. 1007); see *R.* v. *Morgan* (1836), 7 C. & P. 642.

(*j*) Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38), s. 2. Before this Act the sessions had no power to find true bills upon indictments which were beyond their jurisdiction (*R.* v. *Bainton* (1738), 2 Stra. 1088; *R.* v. *Rigby* (1839), 8 C. & P. 770). The writ of *certiorari* is rarely necessary, for the sessions may transmit any indictments found before them to assizes for trial, whether they are beyond their jurisdiction to try or within it (*R.* v. *Wetherell* (1819), Russ. & Ry. 381). The Assizes Relief Act, 1889 (52 & 53 Vict. c. 12), s. 5, provides that nothing in that Act shall affect the right to remove an indictment by *certiorari*, and persons in custody on an indictment removed by *certiorari* are excluded from the operation of s. 3 of the Act. As to venue of removed indictment, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 349.

(*k*) The practice is embodied in Crown Office Rules, 1906, rr. 14, 15, which prescribe two recognisances to be entered into by the prosecutor or defendant at whose instance the indictment has been removed. Crown Office Rules, r. 18 (which reproduces the effect of the Central Criminal Court Act, 1846 (9 & 10 Vict. c. 24), s. 3, repealed). The rule proceeds: "and a jury shall be summoned and the trial proceed in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction." This does not mean that the county or jurisdiction should correspond with that in which the offence was committed. What is meant is that the same issues shall be tried as would have been tried in the Central Criminal Court if the indictment had not been removed (*R.* v. *Castro* (1874), L. R. 9 Q. B. 350). See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 350.

(*l*) *R.* v. *Dudley* (1884), 14 Q. B. D. 273, 280; *R.* v. *Nichols* (1742), cited 13 East, 412, n.; *R.* v. *Huggins* (1730), 2 Ld. Raym. 1574; *R.* v. *Kenworthy* (1823), 1 B. & C. 711, *per* ABBOTT, C.J., at pp. 713, 714; Bac. Abr. tit. Certiorari A; 2 Hawk. P. C., c. 27, s. 31.

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the judge of the court below has doubts as to the nature of the offence or the proper punishment to be awarded (*m*). But this course cannot be adopted where the indictment is for a misdemeanour and the punishment is uncertain (*n*).

(iii.) *Certiorari to Quash.*

*Certiorari* to quash.

**320.** *Certiorari* lies at common law to remove the proceedings of inferior courts or judicial bodies for the purpose of quashing such proceedings where the writ of error did not lie (*o*). It does not lie to quash the judgments of inferior courts of civil jurisdiction (*p*).

Orders.

*Certiorari* lies, therefore, to remove orders made at assizes (*q*) or quarter sessions, other than judgments upon indictments (*r*), and all orders or commissions before justices of the peace (*s*), in order to quash them. It does not, however, lie to remove a decision of justices to commit or refuse to commit a defendant for trial (*a*), nor to remove an acquittal (*b*), for an order of an inferior court, even though defective for errors on its face or for want of jurisdiction, is not void, but only voidable, and therefore to quash an acquittal would be to put a man in peril twice for the same offence (*c*). Where, however, a defendant is convicted by justices, and the conviction is quashed on appeal to quarter sessions, *certiorari* lies on the application of the prosecutor to remove the order of sessions quashing the conviction (*d*).

Indictments and inquisitions.

*Certiorari* lies to remove indictments found at assizes (*e*)

(*m*) *R.* v. *Porter* (1703), 1 Salk. 149.

(*n*) *R.* v. *Nichols* (1742), cited 12 East, 412, n.; *R.* v. *Kenworthy* (1823), 1 B. & C. 711.

(*o*) The writ of error is now abolished with respect to both civil and criminal proceedings (Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 33, Schedule; R. S. C., Ord. 58, r. 1). This rule is repealed, but such repeal was not to revive proceedings in error (Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 6; Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 20). Proceedings in error from the Court of Appeal to the House of Lords may still be brought (*Justice* v. *Mersey Steel Co.* (1876), 1 C. P. D. 575, 577).

(*p*) *Lawes* v. *Hutchinson* (1835), 3 Dowl. 506, *per* PARKE, B., at p. 508. But see *Kemp* v. *Balne* (1844), 1 Dow. & L. 885, *per* WILLIAMS, J., at p. 887, where it is suggested as possible that if there was want of jurisdiction in the lower court *certiorari* to quash might lie after judgment. There appears, however, to be no reported case in which *certiorari* has been granted in such a case.

(*q*) Such as recognisances entered into at assizes upon articles of the peace. Such recognisances may also be removed to be estreated (*R.* v. *Brooke* (1894), 59 J. P. 6), or to have attachment issued upon them (see Crown Office Rules, 1906, r. 254). See also *R.* v. *Lee* (1876), 1 Q. B. D. 198, where an order of a judge of assize for the payment of costs under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 95, was brought up and quashed as having been made without jurisdiction.

(*r*) Error lay upon such judgments; see p. 169, *post*.

(*s*) *Groenvelt* v. *Burwell* (1699), 1 Ld. Raym. 454; Lilly, Abridgment, 253.

(*a*) *R.* v. *Roscommon Justices*, [1894] 2 I. R. 158; see p. 173, *post*.

(*b*) *R.* v. *Galway Justices*, [1906] 2 I. R. 499; and see *R.* v. *Unwin* (1839), 7 Dowl. 578.

(*c*) *R.* v. *Galway Justices*, *supra*.

(*d*) *Ex parte Spencer* (1839), 1 Per. & Dav. 358.

(*e*) Indictments have hardly ever been removed from assizes or the Central Criminal Court in modern times for the purpose of quashing them; for judges of the High Court preside there, and the motion to quash may be made in the court below.

or sessions and coroners' inquisitions, before trial, in order to quash them (*f*); after trial it does not lie (*g*). And where judgment has been given in the court below upon motion to quash the indictment or inquisition in that court, or upon demurrer, *certiorari* does not lie to remove such judgment for the purpose of quashing it (*h*).

Determinations of judicial bodies.

*Certiorari* also lies to remove, for the purpose of quashing, the determinations of persons or bodies who are by statute or charter intrusted with judicial functions out of the ordinary course of legal procedure (*i*), but within the general scope of the common law. The determinations of such authorities are not judgments in the sense required to admit of a writ of error being brought in respect of them (*k*). Thus, the determinations of censors of the Royal College of Physicians (*l*), of commissioners of sewers (*a*), of canal commissioners empowered to hold inquiries with regard to the construction of bridges (*b*), and of sheriffs empowered to hold inquiries under the Lands Clauses Consolidation Act, 1845 (*c*), may be removed in order to be quashed.

Issue and effect of writ.

**321.** The writ of *certiorari* for the purpose of quashing proceedings is granted subject to compliance with conditions imposed by rules made in pursuance of statutory authority (*d*). Its issue,

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(*f*) Where the defect complained of is error on the face of the proceedings, the objection may be taken either on demurrer or upon motion to quash; and demurrers may be removed by *certiorari* for hearing in the court above; see p. 158, *ante*.

(*g*) *Rice* v. *R.* (1616), Cro. Jac. 404; *R.* v. *Seton* (Inhabitants) (1797), 7 Term Rep. 373; *R.* v. *Penegoes* (*Inhabitants*) (1822), 2 Dow. & Ry. (K. B.) 209; *R.* v. *Christian* (1842), 12 L. J. (M. C.) 26; *Nally* v. *R.* (1884), 15 Cox, C. C. 638; *R.* v. *Boaler* (1892), 67 L. T. 354.

(*h*) *R.* v. *Smith* (*W.*) (1838), 2 Mood. & R. 109; *R.* v. *Wilson* (1844), 6 Q. B. 620.

(*i*) It is only in this negative way that it seems possible to describe the miscellaneous bodies, charged with judicial functions, which are amenable to the writ of *certiorari* to quash. The test in each case is whether the writ of error lay. The writ of error lay only upon a regular judgment, pronounced after trial in the ordinary course of common law procedure—that is, in civil cases, where writ and formal pleadings preceded the hearing, and in criminal cases, where indictment, or its equivalent, with pleading thereon, preceded the hearing; see p. 169, *post*.

(*k*) See *Groenvelt* v. *Burwell* (1699), 1 Ld. Raym. 454; *R.* v. *Glamorganshire* (*Inhabitants*) (1700), 1 Ld. Raym. 580. The distinction must be drawn between jurisdiction and procedure. Where a court has a special jurisdiction "out of the course of the common law," *certiorari* does not lie (*Hartley* v. *Hooker* (1777), 2 Cowp. 523); but where the procedure of a court is "out of the course of the common law," that is, where the proceedings are summary and then there are no formal pleadings, as upon civil actions or indictments, then *certiorari* lies, because error does not (*Groenvelt* v. *Burwell*, *supra*); *Case of Commissioners of Sewers for Yorkshire* (1724), 1 Stra. 609; *R.* v. *Manchester and Leeds Rail. Co.* (1838), 1 Per. & Dav. 164; compare *Ball* v. *Pattridge* (1666), Sid. 296.

(*l*) *Groenvelt* v. *Burwell*, *supra*.

(*a*) *Case of Yorkshire Commissioners for Sewers* (1724), 1 Stra. 609.

(*b*) *R.* v. *Aberdare Canal Co.* (1850), 14 Q. B. 854. A presentment of commissioners of sewers may be removed for trial (*R.* v. *Baker* (1859), 28 L. J. (Q. B.) 377).

(*c*) *R.* v. *Manchester and Leeds Rail. Co.* (1838), 8 Ad. & El. 413: *Re Penny* (1857), 7 E. & B. 660; *R.* v. *Sheward* (1880), 9 Q. B. D. 741, C. A.

(*d*) As to these conditions see p. 207, *post*.

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except where application is made by the Attorney-General acting on behalf of the Crown, is discretionary (*e*); and the discretion of the court is exercised upon grounds established at common law (*f*). The writ only operates to effect the removal of the proceedings into the King's Bench Division. It is usual, however, to combine a motion to quash with the motion for the writ; and, whether this is done or not, a divisional court has power to make it part of the order absolute for the writ that upon return the proceedings in the court below shall be quashed without further order (*g*).

(iv.) *Certiorari for the Purpose of Execution or Coercive Process.*

(a) *Judgments of Inferior Courts of Civil Jurisdiction.*

*Certiorari* in aid of execution.

**322.** The limited right formerly existing at common law to remove the judgments of inferior courts of civil jurisdiction into the High Court by *certiorari* for execution (*h*) has been enlarged and superseded by statute (*i*), and such judgments are now removed only by virtue of the statutes referred to in this sub-section.

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(*e*) See p. 191, *post*.

(*f*) As to these grounds see p. 192, *post*.

(*g*) Crown Office Rules, 1906, r. 23. This does not apply where the writ is obtained in order to bring up an order or conviction on which a special case has been stated by justices of the peace (*ibid.*).

(*h*) This right appears to have existed where the judgment debtor had no effects within the jurisdiction of the inferior court (Gilbert, Distress, 149; Lilly, Abridgment, 253), or where execution was hindered or refused in the inferior court (Lilly, Abridgment, 253). But execution in the superior court was limited to such as could be obtained in the jurisdiction of the inferior court, unless the action was one which could not have been commenced elsewhere than in the inferior court (Gilbert, Execution, 150). No judgment could be removed for execution except in case of necessity (Lilly, Abridgment, 252).

(*i*) Previously to the Inferior Courts Act, 1779 (19 Geo. 3, c. 70), the practice of granting *certiorari* to remove judgments from inferior courts seems to have fallen into disuse. A rule was made by the Court of King's Bench "that no *certiorari* ought to be made to remove a judgment out of any inferior court whereby to enable the plaintiff to have execution out of this court" (see Gilbert, Execution (1763), where, however, the date of the rule is not given). Where execution could not be obtained in the court below, execution in the superior court was obtained by the roundabout and expensive method of bringing an action in the superior court upon the judgment in the inferior court. The Inferior Courts Act, 1779 (19 Geo. 3, c. 70) s. 4, was apparently intended to check this abuse and to restore the older practice. The Judgments Act, 1837 (1 & 2 Vict. c. 110), s. 22, extended the right to all judgments of the courts to which the Act related irrespective of the question whether execution could be obtained in the court below. And, although the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), Sched. 9. appears to be restrictive, inasmuch as it empowers the removal of judgments only in cases in which the sum recovered exceeds £20, it is not really so; for it is believed that all the courts to which the Act has been applied (see title COURTS, Vol. IX., p. 132, note (*b*)) are courts which come under the Judgments Act, 1837 (1 & 2 Vict. c. 110), s. 4; and it has been held that these Acts are not inconsistent with one another so far as relates to *certiorari* for execution, but that the right conferred by the later statute is in addition to that possessed under the earlier one (*Paine* v. *Slater* (1883), 11 Q. B. D. 120, C. A.).

So far as relates to county courts, it was held (*Moreton* v. *Holt* (1855), 10 Exch. 707) that the judgments of a county court could not be removed into the superior court under the Inferior Courts Act, 1779 (19 Geo. 3, c. 70), s. 4, or under the Judgments Act, 1837 (1 & 2 Vict. c. 110), s. 22, inasmuch as such judgments were different in their characteristics and consequences from judgments of local

Judgments of local courts.

**323.** The judgments of local courts of record (*k*) may be removed into the High Court for execution:—(1) Where in any such court of common law jurisdiction (*l*) final judgment has been given for the plaintiff (*m*) in any action other than ejectment (*n*) and execution has been levied and no effects of the judgment debtor are to be found within the jurisdiction. (2) Where any judgment, order, or rule has been given or made in any such court, whether of common law or equity jurisdiction, provided that the court is one in which, in the year 1837, a barrister of not less than seven years' standing was acting as judge or assessor or assistant (*o*). (3) Where such court is one to which the provisions of the Borough and Local Courts of Record Act, 1872 (*p*), have been applied (*q*) and final judgment has been there obtained in any action in which the sum recovered is not less than £20, or a rule or order has been made for the payment of not less than £20.

In cases coming within (1) or (2) the judgment is removed by the writ of *certiorari*. In cases coming within (3) it is removed by an order in the nature of *certiorari*. In cases coming within (2) the right to remove the judgment, order, or rule is absolute (*r*), and the writ must be granted even though execution might have been had as conveniently in the inferior court, and though it appears likely that the writ is only applied for in order to increase costs (*s*).

These statutory provisions are not exclusive of one another. Thus, if a local court of record comes under the class of courts mentioned in (3) and also under the class of courts mentioned in (2) its judgments may be removed as of right, irrespective of amount (*t*).

Limitation on removal.

**324.** The statutory right to remove judgments of local courts of record is, however, limited to judgments upon proceedings which are similar in character to those of the High Court. It does not extend to judgments based upon a special jurisdiction of the court

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courts of record or of superior courts. Such rights as existed at common law to remove judgments by *certiorari* could not therefore, even if they had not become obsolete, have applied to the removal of county court judgments. Thus, the power given by successive statutes, and now by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 151, to remove judgments from the county court by *certiorari*, where the sum recovered exceeds £20, cannot be regarded as restricting any previously existing right, but rather as conferring a new right.

(*k*) For a list of these courts, see title COURTS, Vol. IX., pp. 138 *et seq.*

(*l*) Inferior Courts Act, 1779 (19 Geo. 3, c. 70), s. 4.

(*m*) *Batten* v. *Squires* (1835), 4 Dowl. 53, where it was held that the Act did not extend to cases in which judgment was given for the defendant.

(*n*) *Doe* d. *Stansfield* v. *Shipley* (1833), 2 Dowl. 408.

(*o*) Judgments Act, 1837 (1 & 2 Vict. c. 110), s. 22. This Act applies to courts of equity jurisdiction (*Harvey* v. *Gilbard* (1839), 7 Dowl. 616). It does not appear that a list of courts to which this Act applies anywhere exists. In applications under the Act the affidavit of the judgment creditor must state that the court in which his judgment was obtained is a court to which the Act applies.

(*p*) 35 & 36 Vict. c. 86.

(*q*) For a list of the courts to which the Act has been applied, see title COURTS, Vol. IX., p. 132, note (*b*).

(*r*) *Paine* v. *Slater* (1883), 11 Q. B. D. 120, C. A.

(*s*) *Haywood* v. *Saint* (1875), 32 L. T. 566.

(*t*) *Paine* v. *Slater*, *supra*.

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below which the High Court does not possess. Thus, a judgment against a garnishee by foreign attachment in the Mayor's Court, London, will not be removed (*a*); and where the judgment of an inferior court newly created involves consequences which do not attach to a judgment of the High Court, the Acts which have been referred to do not apply (*b*).

Some local courts of record have statutes of their own, under which the right to remove judgments for execution without *certiorari* is conferred (*c*).

County courts do not come within the provisions of any of the statutes relating to the removal of judgments from local courts of record (*d*).

Effect of removal.

**325.** Where the judgment of an inferior court is removed by writ of *certiorari* or by an order in the nature of the writ into the High Court, that court acquires power to deal with such judgment in the same way as it deals with its own judgments. And therefore, if it is shown that the court below was without jurisdiction, or that the judgment was improperly obtained, such judgment may be set aside upon motion (*e*).

(b) *Orders of Inferior Courts of Criminal Jurisdiction.*

Removal of sentence.

**326.** The sentence of any court of criminal jurisdiction may be removed into the High Court, at common law, by *certiorari* for the purpose of execution, as of course, on the application of the Attorney-General on behalf of the Crown (*f*).

The common law right to the writ in aid of the defective coercive powers of inferior courts of criminal jurisdiction (*g*) survives in two cases—(1) to remove recognisances entered into at the assizes or at the sessions for the purpose of estreating them (*h*), or in order that an attachment may be issued on them (*i*), though this

(*a*) *Bulmer* v. *Marshall* (1822), 1 Dow. & Ry.(K. B.) 537.

(*b*) *Moreton* v. *Holt* (1855), 10 Exch. 707.

(*c*) See titles EXECUTION; MAYOR'S COURT, LONDON.

(*d*) *Moreton* v. *Holt*, *supra*. As to removal of judgment of a county court, see County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 151, and title COUNTY COURTS, Vol. VIII., p. 560.

(*e*) *Bridge* v. *Branch* (1876), 1 C. P. D. 633; compare *Williams* v. *Bolland* (1876), 1 C. P. D. 227, and *Simons* v. *de Wints* (*Count*) (1840), 8 Dowl. 646 (in which cases, however, there was merely irregularity in the proceedings).

(*f*) *R.* v. *Garside* (1834), 2 Ad. & El. 266. In this case sentence of death had been passed upon the defendant at the Chester Assizes; a dispute arose between the sheriff of the city and the sheriff of the county with regard to the carrying out of the sentence, each contending that it was the duty of the other to carry it out; the case was removed into the Court of King's Bench by *certiorari* on the application of the Attorney-General, and sentence was executed by the proper officer of that court. See also *R.* v. *Rogers* (1765), 3 Burr. 1809, and *R. C.'s Case* (1629), Cro. Car. 175.

(*g*) At common law the orders and convictions of magistrates might be removed by *certiorari* into the High Court in order that they might be enforced in places beyond the jurisdiction of the magistrates (Bac. Abr. tit. Certiorari; 2 Hale, P. C. 210).

(*h*) *R.* v. *Brooke* (1894), 59 J. P. 6. Where the recognisances are removed from assizes, either the writ or an order in the nature of the writ may be employed (*ibid.*).

(*i*) See Crown Office Rules, 1906, r. 254.

is now rarely necessary, for such recognisances may be estreated at assizes and also at sessions (*k*); (2) to remove proceedings from sessions for the purpose of outlawry (*l*), and to remove proceedings against corporations (*m*).

Orders of magistrates.

**327.** The right to remove orders of magistrates into the superior court for execution appears now to depend entirely upon statute (*n*).

Orders of general or quarter sessions (*o*), other than judgments upon indictments (*a*) or orders to abate nuisances (*b*), may be enforced by removing them into the High Court for execution. Their removal is accomplished by an order in the nature of *certiorari* (*c*). Upon removal they may be carried into effect in the same manner as a writ of the High Court (*d*).

Although an order of sessions is removed as of course for the purpose of execution, execution will not necessarily be allowed. It will not be allowed if the removed judgment was made without jurisdiction or was bad for error on the face of the proceedings (*e*). These objections may be raised either in opposition to an application for an order for execution or upon an independent motion to set aside an order for execution which has already been granted. And they may be raised although *certiorari* has been taken away with regard to the proceedings in the court below (*f*). A defendant, therefore, who has been precluded by statute from disputing the validity of an order made against him by means of an application for *certiorari* to quash the order, may nevertheless be able to resist its execution in any form, upon the very grounds which would have been open to him on an application for *certiorari* to quash, if *certiorari* had not been taken away.

(v.) *Certiorari to remove Orders etc. on Case Stated.*

Case stated.

**328.** *Certiorari* lies for the purpose of removing any conviction, order, or other determination of justices in relation to which a case

(*k*) Criminal Procedure Act, 1853 (16 & 17 Vict. c. 30), s. 2.

(*l*) 2 Hale, P. C. 210. Where proceedings are removed to the High Court for the purpose of outlawry, and the defendant comes in on the exigent, the proceedings are at once sent back to the court below on *procedendo*, which is made absolute in the first instance (*R.* v. *Perry* (1794), 5 Term Rep. 478). As to outlawry generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 431.

(*m*) See title CORPORATIONS, Vol. IX., p. 431.

(*n*) Disobedience to an order of sessions was a misdemeanour indictable at common law; and in practice an indictment for misdemeanour seems to have been the only method in use for enforcing such orders at the time when the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), was passed.

(*o*) *Ibid.*, s. 18.

(*a*) *Hawker* v. *Field* (1850), 20 L. J. (M. C.) 41.

(*b*) *R.* v. *Bateman* (1857), 8 E. & B. 584.

(*c*) *Hawker* v. *Field*, *supra*, where it was held that the writ of *certiorari* itself was not intended to be employed. The terms of s. 18 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), differ only slightly from those of the Inferior Courts Act, 1779 (19 Geo. 3, c. 70), s. 4, and from those of the Judgments Act, 1837 (1 & 2 Vict. c. 110), s. 22; and under these two Acts the writ has always been considered necessary.

(*d*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 18.

(*e*) *R.* v. *Hellier* (1851), 21 L. J. (M. C.) 3; *R.* v. *Hyde* (1852), 21 L. J. (M. C.) 94; and see *Bridge* v. *Branch* (1876), 1 C. P. D. 633.

(*f*) *R.* v. *Hellier*, *supra*; *R.* v. *Hyde*, *supra*.

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has been granted by justices of the peace or by quarter sessions (*g*). The writ is not, however, now necessary where a case has been granted either by justices (*h*) or by quarter sessions (*i*). But *certiorari* for this purpose is not taken away; and the writ may be issued in cases in which it is thought necessary (*k*). It is proper to apply for the writ when a case has been granted and there has been unreasonable delay in stating it (*l*).

(vi.) *Certiorari to remove Depositions for Bail.*

Applications for bail.

**329.** The writ lies to bring up the depositions upon which a defendant has been committed for trial, when application is made to a judge in chambers to admit such prisoner to bail (*m*). But the writ is rarely necessary for this purpose. Upon application to the judge for a summons to show cause why bail should not be granted, it is the proper course for the applicant to produce copies of the depositions verified by affidavit (*n*), and it is only in cases in which such depositions have not been obtained that the writ is now issued.

(vii.) *Certiorari to remove Record for use as Evidence.*

Removal of record as evidence.

**330.** *Certiorari* may be granted to remove a record of an inferior court into the High Court when such record is required for the purpose of evidence in the High Court (*o*). Where granted for

(*g*) A case stated by justices at quarter sessions was originally only an enlargement of the order made by them, and, as forming part of the order, was brought before the superior court in the only way in which it could be brought, namely, by *certiorari* (see *Walsall Overseers* v. *London and North Western Rail. Co.* (1878), 4 App. Cas. 30; and see especially *per* Earl CAIRNS, L.C., at pp. 39—42, explaining the origin of special cases; and see also *R.* v. *Chantrell* (1875), L. R. 10 Q. B. 587). Thus, the writ was not originally ancillary to the special case; but the special case was part of the record removed by the writ. But *certiorari* came to be regarded as merely the machinery to bring the special case before the court (*R.* v. *Thomas* (1857), 7 E. & B. 399), and therefore when a special case was removed by *certiorari* the court would not consider any objections on the face of the order brought before them if they were not raised in the case, even though they would have done so if there had been no case stated and *certiorari* had been applied for (*ibid.*; *R.* v. *Hartpury* (*Inhabitants*) (1847), 16 L. J. (M. C.) 105). See, generally, title MAGISTRATES.

(*h*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 10; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33.

(*i*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 40.

(*k*) An order of course for the writ of *certiorari* may be drawn up at the Crown Office, without any motion, where a case has been stated, upon consent in writing by the solicitor or agent of the opposite party (Crown Office Rules, 1906, r. 233 (m)).

(*l*) *Palmer* v. *Thatcher* (1878), 3 Q. B. D. 346, 355.

(*m*) The former practice was to apply for *habeas corpus* and at the same time for *certiorari* for the depositions. But the writ of *habeas corpus* came to be dispensed with (*R.* v. *Jones* (1817), 1 B. & Ald. 209; *R.* v. *Massey* (1817), 6 M. & S. 108; *R.* v. *Gregory* (1840), 4 Jur. 1015), and now the ordinary course is to apply merely for a summons to show cause why bail should not be granted. As to bail, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 323.

(*n*) *Re Barthelemy* (1852), 17 Jur. 185.

(*o*) *Butcher and Aldworth's Case* (1601), Cro. Eliz. 821; *Jackson* v. *Oaks* (1847), 11 Jur. 1105 (where in an action of malicious prosecution the plaintiff's declaration alleged that he had been acquitted on the charge brought against him in the inferior court, and the defendant pleaded *nul-tiel record*, and *certiorari* was granted to bring up the record of the acquittal); *R.* v. *Midlam* (1765), 3

this purpose, it is sufficient, in the absence of express direction, to return the tenor of the record, that is, to return an exemplification under seal of the inferior court (*p*).

SUB-SECT. 3.—*To what Courts the Writ of Certiorari may issue.*

(i.) *At Common Law.*

(a) *What Courts are amenable.*

Writ cannot be directed to High Court.

**331.** The writ cannot be directed by the High Court to any tribunal which is a branch of the High Court for the purpose of quashing its proceedings (*q*).

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Burr. 1720 (where, a person having been convicted of an offence against the game laws, an action was subsequently brought against him in a superior court for the same offence, and an application made on his behalf to the inferior court for a copy of the conviction for use in evidence on the trial of the action having been refused, *certiorari* was granted to bring up the record of the conviction). For purposes of evidence the writ of *certiorari* was, until recent times, issued out of the common law side of the Court of Chancery. It was so issued where a record of one of the superior courts was required in evidence in another. Thus, where a record of the Court of Common Pleas was required for this purpose in the Court of King's Bench, *certiorari* was issued out of Chancery to remove the record or the tenor of it thither, and when removed an exemplification of it under the Great Seal was transmitted by *mittimus* into the Court of King's Bench (see *Hewson* v. *Brown* (1760), 2 Burr. 1034); and conversely where a record of the Court of King's Bench was required in the Court of Common Pleas (see *Luttrell* v. *Lea* (1633), Cro. Car. 297).

Where the record of an inferior court was required for the purpose of evidence in the Court of King's Bench or Common Pleas, it was not necessary to obtain the writ in Chancery. These two common law courts had power to issue the writ directly to the inferior court for this purpose (*Butcher and Aldworth's Case*, *supra*). The Court of Exchequer had no such power, but in that court the record of an inferior court was permitted to be verified by affidavit (*Re Allison* (1854), 10 Exch. 561).

Where the record of a superior court was required in evidence in a county court there was formerly no way of proving it except by issuing *certiorari* out of Chancery and sending an exemplification under the Great Seal by *mittimus* into the inferior court (*Winsor* v. *Dunford* (1848), 18 L. J. (Q. B.) 14).

Now, however, by R. S. C., Ord. 37, r. 4, office copies of all writs, records, pleadings and documents filed in the High Court of Justice are admissible in evidence in all causes and matters, and between all persons and parties, to the same extent as the originals would be admissible. This rule supersedes the necessity of the writ of *certiorari* issuing out of the common law side of Chancery. It does not, indeed, take away the writ; but as the Chancery Division is now a part of the High Court of Justice, and as the writ of *certiorari* was never issued out of any court to its own officers, it would appear that *certiorari* could not in any case be issued out of the Chancery Division in order to remove the records of any other division of the High Court, or the tenor of such records, for the purpose of evidence, or for any other purpose (see *Skinner* v. *Northallerton County Court Judge*, [1899] A. C. 439). It would appear, however, as stated in the text, that the writ issuing out of the High Court is still available where the record of an inferior court is required in evidence in the High Court, and cannot be obtained otherwise.

(*p*) *Butcher's and Aldworth's Case* (1601), Cro. Eliz. 821; *Woodcraft* v. *Kinaston* (1742), 2 Atk. 317, 318. The original record seems to be necessary where a person is indicted for forgery in respect of any record, or for perjury in any affidavit or deposition. See *Crook* v. *Dowling* (1782), 3 Doug. (K. B.) 75, *per* Lord MANSFIELD, at p. 77; compare *R.* v. *Morris* (1761), 2 Burr. 1189; *R.* v. *Benson* (1810), 2 Camp. 508; *R.* v. *Spencer* (1824); Ry. & M. 97; *Garvin* v. *Caroll* (1847), 10 I. L. R. 323, at p. 330; *Bentall* v. *Sydney* (1839), 10 Ad. & El. 162.

(*q*) An order in the nature of the writ may, however, be directed to assize

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Inferior courts of record.

**332.** The writ can only be directed to inferior courts of record within England and such of its dependencies as are integral parts of England, as, for example, Berwick-upon-Tweed and probably the Isle of Man (*r*). Courts established under the authority of the Crown in India, or in the colonies, whether self-governing or otherwise, are not, it would seem, amenable to the writ (*s*), and even if the records of any such court should be in England *certiorari* will not be granted (*t*).

Courts not of record.

This limitation of the writ to inferior courts of record chiefly affects procedure; for a court which is not of record could be required by the writ of *pone*, or *recordari*, or *accedas ad curiam*, first to draw up a record of proceedings which have taken place before it, and then to transmit this record to the superior court (*a*).

(b) *In respect of what Subject-matter.*

*Certiorari* not granted where error lay.

**333.** *Certiorari* lies only in respect of matters as to which error did not lie (*b*). Thus, it lies to quash presentments of a court leet (*c*); for, though these are found by a jury, they are not judgments, and error did not lie upon them.

Although *certiorari* does not lie where error formerly lay these remedies were not co-extensive; for, whereas the writ of

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courts and the Central Criminal Court to remove indictments for purposes other than that of quashing them, see *R.* v. *Dudley* (1884), 14 Q. B. D. 273, 280, C. A.; *R.* v. *Brooke* (1894), 59 J. P. 6; *Skinner* v. *Northallerton County Court Judge*, [1898] 2 Q. B. 680, C. A.

(*r*) *Re Mansergh* (1861), 1 B. & S. 400, *per* BLACKBURN, J., at p. 411; and see *R.* v. *Cowle* (1759), 2 Burr. 834, 836; *Edwards* v. *Bowen* (1826), 7 Dow. & Ry. (K. B.) 709.

(*s*) *Re Mansergh*, *supra*; and see *Ex parte Lees* (1858), 5 Jur. (N. S.) 333.

(*t*) *Re Mansergh*, *supra*.

(*a*) The old county courts (or sheriff's courts), hundred courts, and courts baron, were inferior courts not of record to which these writs were most commonly directed in former times (as to these courts, see title COURTS, Vol. IX., *passim*). Some few of the county courts and hundred courts were, however, courts of record. *Pone* lay to the county court where the proceedings in that court were commenced by writ of *justicies*, *recordari facias loquelam* where they were commenced by plaint. In the hundred court *pone* was also the appropriate remedy where the proceedings commenced by writ of *justicies*, but *accedas ad curiam* in other cases. *Accedas ad curiam* lay to the court baron, and to all inferior civil courts not of record other than the county courts and hundred courts (Sheppard's Epitome (1656), 864; 3 Bl. Com., 12th ed. (1794), 34—37; Tidd's Practice (1828), 414).

It cannot be said with certainty that all inferior courts not of record are extinct; but it was provided by the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 28, that no action which could be brought in any county court should thereafter be brought in any inferior court not of record.

As to the courts of justices of the peace, see title COURTS, Vol. IX., pp. 9, 74, 75, 82 *et seq.*

(*b*) *Groenveldt* v. *Burwell* (1699), 1 Ld. Raym. 454; and see p. 160, *ante*.

(*c*) *R.* v. *Roupell* (1776), 2 Cowp. 458. As to court leet, see title COURTS, Vol. IX., p. 215. In *R.* v. *Heaton* (1787), 2 Term Rep. 184, the court refused *certiorari* to remove a presentment, after the amerciament had been estreated and paid. In this case, however, there had been delay in applying; the conduct of the applicant did not appear to be *bonâ fide*, and the record of the proceedings had been transmitted to the court of duchy chamber, and had become part of the records of that court.

error lay only for error on the face of the proceedings, *certiorari* to quash lies not only for error on the face of the proceedings, but also for defect of jurisdiction not apparent on the face of the proceedings, but shown by evidence (*d*). But where error lay, *certiorari* will not be granted, although the defect is one in respect of which error was not available and *certiorari* would be. Thus, where an indictment has been tried and judgment pronounced, *certiorari* to quash will not be granted, although what is complained of is defect of jurisdiction not appearing upon the face of the proceedings (*e*).

Nor where writ will be inoperative.

**334.** *Certiorari* will not be granted where, if the writ were subsequently quashed, the inferior court could not be ordered by a writ of *procedendo* to resume the proceedings (*f*). Thus, where an unauthorised person has assumed the office of coroner, and has conducted what purported to be an inquest, *certiorari* will not be granted to bring up the inquisition (*g*), for the proceedings are not merely voidable, but wholly void. And so also, where the proceedings in an inferior court have become null and void by the operation of a statute, *certiorari* will not be granted (*h*).

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(*d*) See pp. 192 *et seq.*

(*e*) This position may be taken to be established. It was, however, questioned in the case of *R.* v. *Boaler*, which has been occasionally referred to in the courts, but which appears to have been reported only in the *Times*, January 25th, 1888. In that case, which was an application to quash an indictment on *certiorari* after judgment, MATHEW, J., said that "it was not necessary to express any opinion on the contention that the court could not in any case quash an indictment after trial. He would be most reluctant to hold that it could not do so in a case in which there existed no other means of doing justice. The cases cited in support of the contention were all cases where an alternative remedy did exist." The court, however, refused to quash the indictment on the merits. A. L. SMITH, J., concurred in the judgment, apparently acquiescing in the above cited *obiter dictum*. It is to be remarked, however, that there is no reported case in which an indictment has in fact been quashed on *certiorari* after judgment, although there must have been innumerable cases in which the writ of error would not afford an alternative remedy, inasmuch as the defect complained of was not apparent on the face of the proceedings. And in a later case, in which the same defendant applied for the writ of *certiorari* to quash another indictment after judgment, the court considered this absence of authority to be conclusive against the application (*R.* v. *Boaler* (1892), 67 L. T. 354. The previous case of *R.* v. *Boaler* was discussed by CAVE, J., in his judgment at p. 354). Similarly, in the case of judgments of inferior courts of civil jurisdiction, it has been suggested that *certiorari* might be granted to quash them for want of jurisdiction (*Kemp* v. *Balne* (1844), 1 Dow. & L. 885, at p. 887), inasmuch as error did not lie upon that ground. But there appears to be no reported case in which the judgment of an inferior court has been quashed on *certiorari*, either for want of jurisdiction or on any other ground. Applications to quash determinations of county courts were, however, entertained in the cases of *Skinner* v. *Northallerton County Court Judge*, [1898] 2 Q. B. 680, C. A., and *R.* v. *Lloyd*, [1906] 1 K. B. 22, C. A., without objection being taken on this ground. In both cases, however, the writ was refused on other grounds.

(*f*) *Weston* v. *Sneyd* (1857), 1 H. & N. 703. In order to restore the record to the inferior court a writ of *procedendo* will be issued on the order of the High Court, which commands the judge of the inferior court to proceed with the case as if *certiorari* had not been granted. Such an order may be made by a judge in chambers (*R.* v. *Scaife* (1852), 18 Q. B. 773).

(*g*) *Re Daws* (1838), 8 Ad. & El. 936.

(*h*) *Weston* v. *Sneyd*, *supra*, where a justice of the peace, who was sued in a county court for acts done in virtue of his office, gave notice of objection

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Nor where matter is not within jurisdiction of High Court.

**335.** The writ can only be issued in respect of matters which are within the jurisdiction of the High Court of Justice (*i*); for proceedings will not be removed into the superior court unless they are capable of being determined there (*k*). Therefore the writ will not be directed to a court which is not one of civil jurisdiction, for example, a court-martial (*l*), at any rate unless it is shown that civil rights have been invaded (*m*).

Local custom etc.

**336.** Where an inferior court is one of civil jurisdiction, but by statute or custom it administers a law peculiar to its own forum in respect of some particular matter, and so possesses to this limited extent a jurisdiction which the superior court does not possess, *certiorari* will not issue to remove proceedings which come within that special jurisdiction. Thus, where an action was brought in a court of the city of London, upon the custom of the city, for imputing unchastity to a woman, *certiorari* to remove the action for trial was refused (*a*), such an action not being then maintainable at common law without proof of special damage (*b*). Similarly, before the Married Women's Property Act, 1882 (*c*), *certiorari* would not lie to remove an action in the Mayor's Court, on the custom of the city, against a *feme covert* as sole trader (*d*); and where proceedings in the inferior court are based upon the customary right of foreign attachment *certiorari* will not be granted to remove them (*e*). Where an inferior court has special jurisdiction of the character described, so that *certiorari* would not be granted to remove a cause coming within that jurisdiction for trial, *certiorari*

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to be sued in that court, by reason of which notice all further proceedings in the county court became null and void (Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 10), and the justice then applied for *certiorari*, and the writ was refused.

(*i*) Before the Judicature Act, 1873 (36 & 37 Vict. c. 66), the writ of *certiorari* issued out of courts of law only in respect of matters within their respective jurisdictions. It issued, indeed, out of the Court of Chancery in respect of common law matters as well as equity matters. But it was issued from the common law side of the court; and, in relation to common law proceedings, it was issued in accordance with common law rules. In such proceedings the writ, when returned, was transmitted to the common law court of appropriate jurisdiction; see note (*n*), p. 187, *post*.

(*k*) *Longbottom* v. *Longbottom* (1852), 8 Exch. 203, *per* POLLOCK, C.B., at p. 208; *Scott* v. *Bye* (1824), 9 Moore (C. P.), 649; *Bates* v. *Turner* (1825), 10 Moore (C. P.), 32; *Tingle* v. *Roston* (1825), 2 Bing. 463; *Bruce* v. *Wait* (1837), 3 M. & W. 21, at p. 23; Lilly, Abridgment, 253.

(*l*) *Re Mansergh* (1861), 1 B. & S. 400. It has been said (*Re Gassock* (1656), 1 Lilly, Register, *per* GLYN, C.J., at p. 253) that, although the superior court has no jurisdiction over the subject-matter of the cause, *certiorari* may issue if the inferior court has none. But in this case the remedy would seem to be by prohibition.

(*m*) *Re Mansergh*, *supra*, *per* COCKBURN, C.J., at p. 406. If civil rights were invaded, or civil jurisdiction usurped, by a court-martial, prohibition would probably be the more appropriate remedy.

(*a*) *Watson* v. *Clerke* (1688), Carth. 75.

(*b*) But see now Slander of Women Act, 1891 (54 & 55 Vict. c. 51).

(*c*) 45 & 46 Vict. c. 75.

(*d*) *Pope* v. *Vaux* (1776), 2 Wm. Bl. 1060.

(*e*) *Bruce* v. *Wait* (1837), 3 M. & W. 21; *Bulmer* v. *Marshall* (1822), 1 Dow. & Ry. (K. B.) 537.

will not be granted to remove the cause, after judgment, for execution (*f*).

New courts.

**337.** Inferior courts, which are newly created, are amenable to *certiorari* if their jurisdiction is within the scope of that of the High Court (*g*); and if the jurisdiction of an existing inferior court is extended by the creation of a new offence, triable by that court, *certiorari* lies to remove proceedings in respect of such offence (*h*). But if a new offence is created, and a peculiar jurisdiction is prescribed which is outside the jurisdiction of the High Court, in accordance with the principle which has been stated *certiorari* will not lie (*i*).

*Certiorari* lies only in respect of judicial acts.

**338.** *Certiorari* lies only in respect of judicial as distinguished from ministerial acts (*k*). Any body of persons who possess authority from the Crown to perform judicial acts constitute a court so as to be amenable to the writ (*l*). Justices of the peace when acting in the capacity of licensing justices do not constitute a court in the ordinary sense; and there is no *lis* before them (*m*), but their acts are nevertheless judicial acts, and *certiorari* lies in respect of them (*n*).

Articles of the peace.

An order of justices in quarter sessions binding over a party against whom articles of the peace have been exhibited may be removed by *certiorari*, together with the articles, in order to be quashed (*o*); and orders of justices allowing items in the county treasurer's accounts (*p*) prohibiting fees to be taken from defendants in certain cases (*q*) and appointing overseers (when their appointment

(*f*) *Bulmer* v. *Marshall* (1822), 1 Dow. & Ry. (K. B.) 537.
(*g*) Bac. Abr. Certiorari, B.
(*h*) *Hartley* v. *Hooker* (1777), 2 Cowp. 523; *R.* v. *Hube* (1794), 5 Term Rep. 542; *R.* v. *Wadley* (1816), 4 M. & S. 508.
(*i*) *Hartley* v. *Hooker*, *supra*.
(*k*) *R.* v. *Lloyd* (1783), Cald. Mag. Cas. 309; *R.* v. *Salford Overseers* (1852), 18 Q. B. 687; *R.* v. *Woodhouse*, [1906] 2 K. B. 501, C. A.
(*l*) *R.* v. *Woodhouse*, *supra*.
(*m*) *Boulter* v. *Kent Justices*, [1897] A. C. 556.
(*n*) *R.* v. *Woodhouse*, *supra*, where the application was to bring up an order under the Licensing Act, 1904 (4 Edw. 7, c. 23), s. 1 (2), referring an application for renewal of a licence to quarter sessions (the judgment in this case was reversed, on other grounds, *sub nom. Leeds Corporation* v. *Ryder*, [1907] A. C. 420). In *R.* v. *Sharman, Ex parte Denton*, [1898] 1 Q. B. 578, it was held that justices at a licensing meeting, under the law as it existed before the Licensing Act, 1904 (4 Edw. 7, c. 23), were acting in an administrative capacity, and that *certiorari* would not lie. This case was followed in *R.* v. *Bowman*, [1898] 1 Q. B. 663; but in *R.* v. *Manchester Justices*, [1899] 1 Q. B. 571, it was held that the order of the confirming authority was a judicial act, in respect of which *certiorari* would lie. And so also it was held in *R.* v. *Sunderland Justices*, [1901] 2 K. B. 357, C. A. In *R.* v. *Johnson*, [1905] 2 K. B. 59, it was held that an order of justices under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 26, extending the hours during which a licensed house may be kept open for the sale of intoxicating liquors is a judicial order, and that *certiorari* would lie in respect of it. The case of *R.* v. *Sharman, Ex parte Denton, supra*, was not followed in *R.* v. *Woodhouse, supra*; and, so far as it can be considered to have any authority at all, its application is limited to proceedings of a licensing meeting before the Licensing Act, 1904 (4 Edw. 7, c. 23).
(*o*) *R.* v. *Dunn* (1840), 4 Per. & Dav. 415.
(*p*) *R.* v. *Saunders* (1854), 3 E. & B. 763.
(*q*) *R.* v. *Coles* (1845), 8 Q. B. 75.

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was made by justices) (*r*) have been held to be judicial acts, capable of being removed by *certiorari*.

Gas examiner.

A report made by the chief gas examiner of the county council has been removed and quashed (*s*); and it seems that *certiorari* will lie to remove a certificate as to the redemption of tithe rate (*t*), or a certificate given by Commissioners of Income Tax authorising repayment of sums paid in respect of income tax (*a*), or an order for the indorsement of a licence (*b*) under the Motor Car Act, 1903 (*c*).

Income tax etc.

Resolution of vestry.

The resolution of a vestry is not a judicial act, even when it is the necessary preliminary to an order of justices for the appointment of certain officials. Neither the resolution nor the copy of it forwarded to the justices can be removed by *certiorari*; but the order of the justices making the appointment may be removed (*d*).

Appointment of justices' clerk.

Licences etc.

The appointment by justices of a clerk is not a judicial act (*e*), nor is the grant of a licence by the court of the Company of Watermen and Lightermen (*f*), nor the grant of an excise licence for a beer-house granted by the Board of Inland Revenue (*g*), nor the making or allowing of a poor rate (*h*), nor the issuing of a warrant by a justice (*i*), nor an order of quarter sessions illegally directing a solicitor to bring an information against a certain individual (*k*), nor a statutory certificate for the admission of a lunatic into an asylum (*l*); and in none of these cases will the writ of *certiorari* be granted (*m*).

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(*r*) *Case of Warwick Borough* (1734), 2 Stra. 991; *R.* v. *Great Marlow* (*Inhabitants*) (1802), 2 East, 244; *R.* v. *Standard Hill* (*Inhabitants*) (1815), 4 M. & S. 378; but see *R.* v. *Somersetshire Justices* (1822), 1 Dow. & Ry. (K. B.) 443.

(*s*) *R.* v. *London County Council, Ex parte Commercial Gas Co.* (1895), 11 T. L. R. 337 (the report was said by the court to be "virtually a judgment").

(*t*) *R.* v. *Board of Agriculture* (1899), 15 T. L. R. 176, where, however, *certiorari* was refused on the merits.

(*a*) *R.* v. *City of London Commissioners of Income Tax, Ex parte Inland Revenue Commissioners* (1904), 91 L. T. 94, where also the writ was refused on the merits.

(*b*) *Re Marsham, Ex parte Chamberlain* (1907), 97 L. T. 396, where the writ was granted; but the question whether the indorsement of a licence under the Motor Car Act, 1903 (3 Edw. 7, c. 36), was a judicial act does not appear to have been raised.

(*c*) 3 Edw. 7, c. 36, s. 4.

(*d*) *Re Hipperholme* (*Constables*) (1847), 5 Dow. & L. 79.

(*e*) *R.* v. *Drummond, Ex parte Saunders* (1903), 88 L. T. 833. But *certiorari* was granted to bring up an order of commissioners of sewers for the removal of their clerk (*Commissioners of Sewers for Yorkshire Case* (1724), 1 Stra. 609).

(*f*) *R.* v. *Watermen's Company*, [1897] 1 Q. B. 659.

(*g*) *R.* v. *Salford Overseers* (1852), 18 Q. B. 687.

(*h*) *R.* v. *Uttoxeter* (*Inhabitants*) (1732), 2 Stra. 931; and see the report of this case in Bott's Poor Law, Vol. I., 293; *R.* v. *Shrewsbury Justices* (1734), 2 Stra. 975; *R.* v. *King* (1788), 2 Term Rep. 234; and see *R.* v. *Wavell* (1779), 1 Doug. (K. B.) 116.

(*i*) *R.* v. *Lediard* (1751), Say. 6; *Ex parte Taunton* (1831), 1 Dowl. 54.

(*k*) *R.* v. *Lloyd* (1783), Cald. Mag. Cas. 309.

(*l*) *R.* v. *Hatfield Peverel* (*Inhabitants*) (1849), 18 L. J. (M. C.) 225, where the certificate was signed in accordance with the (repealed) Lunacy Regulation Act, 1845 (8 & 9 Vict. c. 100), s. 48, by a clergyman and an overseer, who, after personal examination and after calling in the assistance of a medical man, declared in due form that they were "satisfied" that the person examined was of unsound mind.

(*m*) In *Re Empire Theatre, R.* v. *London County Council* (1894), 71 L. T. 638,

Public policy.

**339.** There are some acts on the part of tribunals with regard to which, upon grounds of public policy, the writ will be refused irrespective of the question whether such acts are of a judicial or of a ministerial character. Thus, *certiorari* will not be granted to bring up a provisional order made by a Secretary of State which is subject to confirmation by Act of Parliament (*n*), for to issue the writ would be to interfere with the functions of Parliament. The order of a court of quarter sessions granting exclusive audience to barristers will not be removed, because courts of justice possess inherent rights with regard to the regulation of their own procedure (*o*). The decision of justices to commit a defendant for trial or to admit him to bail will not be removed, inasmuch as to grant the writ in cases of this kind would cause delay and embarrassment in the administration of the law (*p*). *Certiorari* will not lie to remove assessments to the land tax, because to remove them would occasion grave public inconvenience (*q*).

(ii.) *By Statute.*

Statutory conditions.

**340.** The legislature has expressly provided that the remedy of *certiorari* shall be open to aggrieved parties for the purpose of quashing certain proceedings. As to some of these proceedings, the question whether *certiorari* would or would not have been available at common law, in the absence of any statutory provision, is not free from doubt (*r*). But where *certiorari* is expressly made available by statute, the writ can only be granted subject to the restrictions, if any, imposed by the statute, and upon the grounds, if any, specified therein.

Municipal corporations

**341.** Any order of the council of a municipal corporation for the payment of money out of the borough fund (*s*), or any order of

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640, WRIGHT, J., expressed a doubt whether the committee appointed by the London County Council for hearing applications for music and dancing licences was amenable to the writ of *certiorari*. In *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A., it was held that this committee was not a court, at any rate for all purposes; but in *R.* v. *London County Council, Ex parte Akkersdyk, Ex parte Fermenia*, [1892] 1 Q. B. 190, it was held that in granting or refusing licences the committee must act judicially. Upon the authority, therefore, of *R.* v. *Woodhouse*, [1906] 2 K. B. 501, C. A., it would seem that *certiorari* would lie.

(*n*) *R.* v. *Hastings Board of Health* (1865), 6 B. & S. 401, where COCKBURN, C.J., and MELLOR, J., rested their judgment solely upon the ground that it would be improper to interfere with an order which was subject to review by Parliament.

(*o*) *R.* v. *Denbighshire Justices* (1846), 15 L. J. (Q. B.) 335.

(*p*) *R.* v. *Roscommon Justices*, [1894] 2 I. R. 158, where the decision turned on the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 15, the language of which is practically identical with that of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 25; and O'BRIEN, C.J., at p. 172, apparently rested his judgment, not only on the ground of inconvenience, but also on the circumstance that, although the decision in question involved a judicial act, the act was not "recorded" or required by statute to be so.

(*q*) *R.* v. *King* (1788), 2 Term Rep. 234.

(*r*) *R.* v. *Woodhouse*, *supra*, *per* MOULTON, L.J., at p. 535.

(*s*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 141.

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a county council for the payment of money out of the county fund (*t*), may be removed into the King's Bench Division and may be wholly or partly disallowed, or confirmed, with or without costs, according to the judgment and discretion of the court. The question to be determined by the court with regard to these orders is not whether the payments authorised by them are legal in the sense that they could have been enforced, but whether or not they amount to a misapplication of the fund out of which they are paid (*a*).

Local government auditors.

**342.** Anyone aggrieved by any allowance, disallowance, or surcharge of the auditor of the accounts of any union (*b*), parish council (*c*), parish meeting for a parish not having a council (*d*), district council (*e*), joint committee of parishes or district councils (*f*), urban district council (not being the council of a borough) (*g*), metropolitan borough (*h*), county council (*i*), local education authority (*k*), or lunatic asylum (*l*), or of the Metropolitan Water Board (*m*), may apply to the High Court for a writ of *certiorari* to remove such allowance, disallowance, or surcharge; and if it appears to the court that the decision of the auditor was erroneous, either in law or in fact (*n*), it may set it aside.

Orders of Local Government Board.

**343.** Any person aggrieved by orders of the Local Government Board (*o*) (formerly made by the Poor Law Commissioners (*p*)) may apply for *certiorari* to remove them into the High Court (*q*).

(*t*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 80. This applies to the London County Council (*ibid.*, s. 100). See titles LOCAL GOVERNMENT; METROPOLIS.

(*a*) *R.* v. *Prest* (1850), 16 Q. B. 33, *per* Lord CAMPBELL, C.J., at p. 43; *R.* v. *Brighton Corporation* (1907), 23 T. L. R. 440, C. A.

(*b*) Poor Law Amendment Act, 1844 (7 & 8 Vict. c 101), s. 35.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58.

(*d*) *Ibid.*

(*e*) *Ibid.*

(*f*) *Ibid.*, s. 57.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247.

(*h*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 14.

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 71 (3).

(*k*) Education Act, 1902 (2 Edw. 7, c. 42), s. 18; Education (London) Act, 1903 (3 Edw. 7, c. 24), s. 1.

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 279.

(*m*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 19.

(*n*) *R.* v. *Hunt* (1856), 6 E. & B. 408; *R.* v. *Haslehurst* (1887), 51 J. P. 645; *R.* v. *More O'Ferrall*, [1903] 2 I. R. 141, C. A.; *R.* v. *Roberts*, [1908] 1 K. B. 407, C. A., and see *R.* v. *Tyrwhitt* (1853), 2 E. & B. 77.

(*o*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), ss. 105, 106.

(*p*) The powers of the Poor Law Commissioners were transferred to the Local Government Board by the Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 7.

(*q*) The Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 105, provides that no *certiorari* shall be granted in respect of the orders of the Poor Law Commissioners except into the King's Bench; and s. 106 provides the conditions on which the writ may be granted. The Act certainly does not purport to give a new right, but rather to restrict a right assumed to exist (see *R.* v. *Woodhouse*, [1906] 2 K. B. 501, C. A., *per* MOULTON, L.J., at p. 535). And it would appear probable that the orders of the Poor Law Commissioners would have been removable by *certiorari* apart from the statute. By the provisions of s. 106 of the Act ten days' notice of the application must be given to the Local Government Board with a statement of the grounds upon which it is made; and the party

These orders are dealt with on the same principles as the orders of justices. If they are good on their face, and if it is within the scope of the authority of the Local Government Board to make them, the court will not consider whether a sound discretion has been exercised (*r*).

Orders of Board of Agriculture and Fisheries.

**344.** Persons who are interested in, and dissatisfied with, the decision of the Board of Agriculture and Fisheries (exercising the jurisdiction formerly vested in the Tithe Commissioners) respecting the boundary of any parish are empowered to apply for *certiorari* to remove such decision into the High Court (*s*). The High Court may quash the decision of the Board, not merely for want of jurisdiction or for error on the face of the proceedings (*t*), but also on the merits as though by way of appeal (*a*). When the court thinks fit it may direct the trial of issues in order to determine disputed questions of fact (*b*).

(iii.) *Certiorari taken away by Statute.*

(a) *By what Words Certiorari is taken away.*

When *certiorari* is taken away.

**345.** It is enacted by various statutes that proceedings under them shall not be removed by the writ of *certiorari*. *Certiorari* is said to be "taken away" by such statutes. *Certiorari* can only be taken away by express negative words (*c*). It is not taken away by words which direct that certain matters shall be "finally determined" in the inferior court (*d*), nor by a proviso that "no other court shall intermeddle" with regard to certain matters as to which jurisdiction is conferred on the inferior court (*e*).

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applying is required to enter into recognizances in the sum of £50 to prosecute the *certiorari* without delay, and, in the event of the order complained of being confirmed, to pay the Board its taxed costs within ten days after the decision of the High Court (these provisions must be read together with the Crown Office Rules, 1906, r. 30; see note (*f*), p. 207, *post*).

(*r*) *Re Newport Union*, *R.* v. *Poor Law Commissioners* (1837), 6 Ad. & El. 54; *R.* v. *Local Government Board*, [1901] 1 K. B. 210, C. A.

(*s*) Tithe Act, 1837 (7 Will. 4 & 1 Vict. c. 69), s. 3; and see Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), ss. 2, 11; Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), s. 1. The application must be within six months after the publication of the boundaries. Eight days' notice of the application and of the grounds on which it is made must be given to the Commissioners and recognisances to the amount of £50 entered into to prosecute the *certiorari* without delay, and to pay the Commissioners their full costs within one calendar month after confirmation of the judgment of the Commissioners if it is confirmed (these conditions must be read with the Crown Office Rules, 1906, r. 30; and see note (*f*), p. 207, *post*). As to the powers of the Commissioners generally, see title ECCLESIASTICAL LAW.

(*t*) *Re Dent Tithe Commutation* (1845), 8 Q. B. 43.

(*a*) *Ibid.*; *R.* v. *Merson* (1842), 12 L. J. (Q. B.) 7.

(*b*) Tithe Act, 1839 (2 & 3 Vict. c. 62), s. 35. The court will not direct an issue unless it is shown that the decision of the Commissioners (now the Board of Agriculture and Fisheries) was wrong (*R.* v. *Merson*, *supra*). As to feigned issues, see R. S. C., Ord. 34, rr. 10—12; *Brown* v. *Hutchinson* (1849), 13 Q. B. 185; *Thorpe* v. *Plowden* (1848), 17 L. J. (EX.) 235, Ex. Ch.

(*c*) *R.* v. *Cashiobury Justices* (1823), 3 Dow. & Ry. (K. B.) 35; *R.* v. *Jukes* (1800), 8 Term Rep. 542; *R.* v. *Plowright* (1686), 3 Mod. Rep. 94; *R.* v. *Moreley* (1760), 2 Burr. 1040; S. C., 1 Wm. Bl. 231.

(*d*) *R.* v. *Jukes*, *supra*; *R.* v. *Plowright*, *supra*.

(*e*) *R.* v. *Moreley*, *supra*.

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Where *certiorari* is taken away by statute with regard to proceedings for a certain offence, and a later statute, which is silent as to *certiorari*, confers on the inferior court additional powers for the punishment of an offender, and proceedings are taken under the later statute, *certiorari* lies (*f*). But where a statute which imposes penalties contains a clause by which *certiorari* is taken away, and by a later statute, which is silent as to *certiorari*, the destination of the penalties is altered, *certiorari* cannot be granted to remove proceedings in respect of such penalties (*g*).

*Certiorari* may be taken away by words which incorporate the provisions of a previous Act in which *certiorari* is taken away (*h*); and where by one section of an Act which confers jurisdiction on justices in petty sessions *certiorari* is taken away as to all proceedings under the Act, and by a later section power is given to appeal to quarter sessions, *certiorari* is taken away with regard to such appeals (*i*).

Limitation.

**346.** The rule that *certiorari* can only be taken away by express negative words is limited to cases in which *certiorari* is available at common law. It does not apply where *certiorari* is the creature of statute (*k*). Clauses by which *certiorari* is taken away are strictly construed (*l*).

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(*f*) *R.* v. *Terret* (1788), 2 Term Rep. 735.

(*g*) *R.* v. *Hester* (1836), 4 Dowl. 589.

(*h*) *R.* v. *Yorkshire West Riding Justices* (1834), 3 Nev. & M. (K. B.) 802; *R.* v. *Staffordshire Justices* (1867), 16 L. T. 430; compare *Parker* v. *Bristol and Exeter Rail. Co.* (1851), 6 Exch. 184.

(*i*) *R.* v. *Lindsey Justices* (1845), 3 Dow. & L. 101.

(*k*) Thus, where a statute afforded the remedy of *certiorari* to persons aggrieved by the decisions of certain officials, and by a later section provided that with regard to some particular matters the decision of those officials should be final, it was held that *certiorari* did not lie in respect of decisions relating to such matters (*R.* v. *Hunt* (1856), 6 E. & B. 408, which was decided on the construction of the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), ss. 3, 35, 39).

(*l*) Stat. 25 Geo. 2, c. 36, s. 10 (repealed), taking away *certiorari* in respect of certain indictments found at sessions and assizes, was held not to extend to an indictment found at sessions which had been removed into the Central Criminal Court under the Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), s. 16; and *certiorari* was granted to remove it from the Central Criminal Court into the King's Bench Division (*R.* v. *Brier* (1850), 14 Q. B. 568). The Highway Act, 1835 (5 & 6 Will. 4, c. 50), empowered justices to order indictments to be preferred at assizes in respect of certain matters, and it was provided by s. 95 that no matter or thing done or transacted in relation to the execution of the Act should be removed by *certiorari;* and it was held that an indictment at assizes ordered by justices under the Act might be so removed, for, though ordered under the Act, the indictment was found at common law (*R.* v. *Sa[illegible]on (Inhabitants)* (1854), 3 E. & B. 547). *Certiorari* was taken away by stat. 1 Ann. c. 12 (c. 18, Ruff.) in respect of indictments for the non-repair of bridges, and it was held that the restriction applied only to cases in which bridges were repairable by the county, and not to cases in which they were repairable by individuals or by the parish (*R.* v. *Hamworth (Inhabitants)* (1731), 2 Stra. 900). Where justices in pursuance of powers conferred on them by stat. 5 Geo. 4, c. 85, s. 1 (repealed), authorised a contract entered into by a borough council, *certiorari* was granted to remove the order, although the power of the borough council to enter into the contract was conferred on it by another statute, namely, the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 114, by which *certiorari* was taken away (*R.* v. *Lancashire Justices* (1839), 11 Ad. & El. 144).

(b) *Effect of Certiorari being taken away.*

Effect upon Crown.

**347.** Although *certiorari* is taken away by statute, the writ may nevertheless be granted on the application of the Crown. Clauses by which *certiorari* is taken away do not affect the Crown, unless it is expressly mentioned, or unless there are words to show a clear intention that the Crown shall be included in the operation of such clauses (*m*). This rule extends, unless a contrary intention is manifested, to private persons prosecuting in the name of the King, though the Crown is not directly interested, and though the prosecutor may have become nominally the defendant (*n*).

Inferior court.

**348.** Although *certiorari* is taken away, it may be granted, even on the application of the defendant, where the inferior court has acted without or in excess of jurisdiction; for in such a case the court has not brought itself within the terms of the statute taking away *certiorari* (*o*). Thus, *certiorari* will lie, although taken away, where the subject-matter of the inquiry was beyond the scope of the authority of the inferior court, either by reason of its nature (*p*) or by reason of the absence of some essential preliminary (*q*); and it will also lie where, by reason of interest or prejudice, the inferior court was improperly constituted and was therefore without jurisdiction to entertain the cause (*r*). Where a conviction has been obtained by fraud the writ will be granted for the purpose of quashing it, although *certiorari* is taken away (*s*).

Fraud.

Special case.

**349.** Where *certiorari* has been taken away with an express exception in favour of *certiorari* to bring up a special case, and the writ is granted for that purpose, the record cannot be quashed upon any grounds which are not raised in the special case (*t*). But where an order of sessions has been removed into the High Court for execution (*a*), the defendant may oppose an order for

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(*m*) *R.* v. *Clace* (*Inhabitants*) (1769), 4 Burr. 2456, *per* Lord MANSFIELD, C.J., at p. 2458; *R.* v. *Davies* (1794), 5 Term Rep. 626; *R.* v. —— (1815), 2 Chit. 136; *R.* v. *Allen* (1812), 15 East, 333; *R.* v. *Thomas* (1815), 4 M. & S. 442; *Mountjoy* v. *Wood* (1856), 2 Jur. (N. S.), 452; and see titles CONSTITUTIONAL LAWS, Vol. VI., p. 409; STATUTES.

(*n*) *R.* v. *Cumberland* (*Inhabitants*) (1795), 6 Term Rep. 194; *R.* v. *Bodenham* (*Inhabitants*) (1774), 1 Cowp. 78; *R.* v. *Boultbee* (1836), 4 Ad. & El. 498.

(*o*) *Colonial Bank of Australasia* v. *Willan* (1874), L. R. 5 P. C. 417.

(*p*) *R.* v. *Wood* (1855), 5 E. & B. 49; *Ex parte Bradlaugh* (1878), 3 Q. B. D. 509.

(*q*) *R.* v. *St. Albans Justices* (1853), 22 L. J. (M. C.) 142; *R.* v. *Somersetshire Justices* (1826), 5 B. & C. 816.

(*r*) *R.* v. *Cheltenham Commissioners* (1841), 1 Q. B. 467.

(*s*) *R.* v. *Gillyard* (1848), 12 Q. B. 527; see p. 197, *post.*

(*t*) *R.* v. *Thomas* (1857), 7 E. & B. 399, where the statute under which the proceedings were taken contained a section which enacted that no conviction under the statute should be removable by *certiorari* except as thereinafter mentioned; and by a later section it was provided that in case of appeal to quarter sessions the justices might state the facts specially for the determination of the superior court, in which case it should be lawful to remove the proceedings by *certiorari;* and it was held that, by the later section, *certiorari* was preserved merely as machinery, and that no objections could be taken to the order removed under it except such as were raised by the case stated (see also *R.* v. *Hartpury* (*Inhabitants*) (1847), 16 L. J. (M. C.) 105, and note (*g*), p. 166, *ante*).

(*a*) See p. 165, *ante.*

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execution, or may move to set it aside if it has been granted, upon grounds which would have been available on an application for a writ of *certiorari* to quash the proceedings in the inferior court, although *certiorari* is taken away with regard to such proceedings (*b*).

Order in nature of *certiorari*.

Where *certiorari* is taken away, the restriction is limited to the writ of *certiorari* properly so called, and does not prevent proceedings under the Act by which it is taken away from being removed by an order in the nature of *certiorari* (*c*).

Indictment.

Where common law counts are joined in an indictment with counts under a statute by which *certiorari* is taken away, *certiorari* may be granted to remove the indictment (*d*).

Consent of parties.

Where *certiorari* is taken away, the consent of the parties cannot give the superior court jurisdiction to grant the writ (*e*).

(iv.) *Statutory Restrictions.*

(a) *Certiorari to remove for Trial in Civil Cases.*

Removal for trial.

**350.** Where an action is brought in an inferior court of common law jurisdiction, there is at common law an absolute right to remove it into the High Court, subject to any restrictions or conditions imposed by statute (*f*).

Local courts.

**351.** In the case of local courts of record of common law jurisdiction (*g*) to which the Borough and Local Courts of Record Act,

(*b*) *R.* v. *Hellier* (1851), 21 L. J. (M. C.) 3; *R.* v. *Hyde* (1852), 21 L. J. (M. C.) 94.

(*c*) *R.* v. *Sill* (1852), Dears. C. C. 10. By stat. (1827) 7 & 8 Geo. 4, c. 29, s. 53, it was provided that no indictment for obtaining money under false pretences should be removed by *certiorari*. By the Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), s. 16, power was given to the High Court, or to any judge of the High Court or the commission of the Central Criminal Court, or to the recorder of the city of London to remove indictments from sessions in London or Middlesex, "by *certiorari* or otherwise," into the Central Criminal Court (see p. 159, *ante*); and it was held in *R.* v. *Sill*, *supra*, that an indictment for obtaining money under false pretences might be removed, under the last-mentioned Act, into the Central Criminal Court, inasmuch as the procedure authorised by that Act was not, properly speaking, procedure by the writ of *certiorari*, but by an order in the nature of *certiorari*; see also *R.* v. *Brier* (1850), 14 Q. B. 568.

(*d*) *R.* v. *Saunders* (1825), 5 Dow. & Ry. (K. B.) 611.

(*e*) *R.* v. *Chantrell* (1875), L. R. 10 Q. B. 587; but see *R.* v. *Dickenson* (1857), 7 E. & B. 831.

(*f*) *Edwards* v. *Liverpool Corporation* (1902), 86 L. T. 627, where an application was made to remove an action from the Liverpool Court of Passage, a court to which the provisions of the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), have not been applied, and the court held that the provision in the Liverpool Court of Passage Act, 1893 (56 & 57 Vict. c. 37), s. 5, that it shall be lawful for the High Court or a judge thereof to order the removal by writ of *certiorari* or otherwise of any action or matter commenced in the Court of Passage, if the High Court or a judge thereof shall deem it desirable that the action or matter should be tried in the High Court, was not sufficient to take away the common law right to remove the action, and that *certiorari* must be granted as of course; see also *Landens* v. *Shiel* (1834), 3 Dowl. 90, *per* LITTLEDALE, J., at p. 91; *Edwards* v. *Bowen* (1826), 5 B. & C. 206; *Parker* v. *Bristol and Exeter Rail. Co.* (1851), 6 Exch. 184; *Brookman* v. *Wenman* (1851), 20 L. J. (Q. B.) 278; and compare *Cherry* v. *Endean* (1886), 54 L. T. 763. For a list of the principal local courts of record, see title COURTS, Vol. IX., pp. 138 *et seq.*

(*g*) The statutory conditions about to be referred to were not applicable to

1872, has not been applied, the restrictions and conditions which exist (apart from such as may be imposed by their own special statutes, if they have any) are as follows:—

(1) If the judge of the court below is a barrister of at least three years' standing, *certiorari* does not lie where the debt, damage, or thing demanded does not amount to £5, unless the action concerns the freehold or inheritance or title to lands, lease, or rent (*h*).

(2) Where the amount claimed is less than £20, the cause is not to be removed by *certiorari* unless the party desiring removal shall enter into recognisances to pay the amount which may be recovered against him, with costs (*i*).

(3) The writ is not to be received or allowed by the court below unless it is delivered before issue or demurrer joined (so that such issue or demurrer be not joined within six weeks after appearance) (*k*), or before the jury are sworn (*l*).

Leave of judge.

**352.** In the case of local courts of record of common law jurisdiction (*m*) to which the Borough and Local Courts of Record Act, 1872 (*n*), has been applied (*o*), in addition to the restrictions and conditions which have been mentioned, and in addition to the restrictions and conditions, if any, imposed by the special Act of the lower court (*p*), it is provided that no action may be removed from

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equitable proceedings removed into the Court of Chancery from inferior courts having equitable jurisdiction; and it is conceived that they are not now applicable.

(*h*) Stat. (1623) 21 Jac. 1, c. 23, ss. 4, 5, 6. Where there are several distinct causes of action, those only which amount to £5 can be removed (Frivolous Arrests Act, 1725 (12 Geo. 1, c. 29), s. 3). To comply with the condition of the statute, the barrister of three years' standing must be actually present at the trial (*Fairley* v. *McConnell* (1758), 1 Burr. 514, 515). Interference with a right of way is a matter which concerns the freehold (*Franks* v. *Quinsee* (1839), 7 Dowl. 607).

(*i*) Inferior Courts Act, 1779 (19 Geo. 3, c. 70), s. 6 (amended by Imprisonment for Debt Act, 1827 (7 & 8 Geo. 4, c. 71), s. 6). The recognisance is in double the amount demanded, and two sufficient sureties are required (Inferior Courts Act, 1779 (19 Geo. 3, c. 70), s. 5). If the sum claimed in the declaration is more than £20, the Act does not apply, even though the actual sum to be recovered is less than £20 (*Brady* v. *Veeres* (1836), 5 Dowl. 416). Where the sum claimed is exactly £20, recognisances are not required (see *Attenborough* v. *Hardy* (1824), 4 Dow. & Ry. (K. B.) 362; *Cotton* v. *Baiers* (1837), 1 Jur. 22). The statute extends to actions of tort (*Lee* v. *Goodlad* (1824), 4 Dow. & Ry. (K. B.) 350; *Furnish* v. *Swann* (1830), 10 B. & C. 458; *Franks* v. *Quinsee* (1839), 7 Dowl. 607).

(*k*) Stat. (1623), 21 Jac. 1, c. 23, s. 2; see p. 185, *post*.

(*l*) Stat. (1601) 43 Eliz. c. 5; see p. 185, *post*.

(*m*) See note (*b*), p. 167, *ante*. But as to equity cases removed from the Mayor's Court into the Chancery Division, see p. 158, *ante*.

(*n*) 35 & 36 Vict. c. 86.

(*o*) For a list of these courts, see title COURTS, Vol. IX., p. 132, note (*b*).

(*p*) The Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 17, provides that no cause depending in the Mayor's Court shall be removed before judgment unless the writ of *certiorari* shall have been lodged with the proper officer of the court within one month after service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial. These periods are alternative (*Prim* v. *Smith* (1888), 57 L. J. (Q. B.) 336, C. A.). The Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), has been applied to the Mayor's Court, and no cause can now be removed from the Mayor's Court except in accordance with the

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such courts into the superior court by *certiorari* or otherwise, except by leave of a judge of the superior court, in cases which shall appear to such judge fit to be tried in the superior court, and upon such terms as to payment of costs, security for debt or costs, or other terms as such judge shall think fit (*q*). By this provision the common law right to *certiorari* is taken away; and the writ can only be granted by the prescribed leave (*r*).

County courts.

**353.** Actions of replevin may be removed from a county court as of course (*s*), on the application of the defendant, subject to his giving security, to be approved by a master of the High Court, for such amount, not exceeding £150, as he may think fit (*t*). The removal of other actions in the county court have been referred to elsewhere (*a*).

(b) *Certiorari to remove Indictments.*

Removal of indictments for trial.

**354.** *Certiorari* to remove indictments (*b*) for trial can only be granted subject to conditions imposed by the Crown Office

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provisions of that Act (*Cherry* v. *Endean* (1886), 54 L. T. 763). But the above provisions of the special Act of the court, and the conditions imposed by the general Acts before mentioned, must also be observed. See title MAYOR'S COURT, LONDON.

(*q*) Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), Sched., r. 12; and see p. 157, *ante*. The expression "fit to be tried in the High Court" means "more" fit to be tried there than in the inferior court (*Banks* v. *Hollingsworth*, [1893] 1 Q. B. 442, C. A.). The discretion given to the court under the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), appears therefore to correspond exactly with that given by the County Courts Act, 1888 (51 & 52 Vict. c. 43).

(*r*) *Cherry* v. *Endean, supra;* see *Simpson* v. *Shaw* (1886), 56 L. J. (Q. B.) 92; and compare *Edwards* v. *Liverpool Corporation* (1902), 86 L. T. 627; *Symonds* v. *Dimsdale* (1848), 2 Exch. 533. *Certiorari* for execution under the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), Sched., r. 9, is in addition to any right the court may already possess for the removal of judgments for execution (see *Paine* v. *Slater* (1883), 11 Q. B. D. 120, C. A.). But *certiorari* to remove for trial under the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 85), Sched., r. 12, is in substitution for the previously existing right to remove for trial, subject, however, to restrictions imposed by other statutes.

(*s*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 137. As to replevin generally, see title DISTRESS.

(*t*) The security is conditioned to defend the action with effect and (unless the replevisor discontinues or does not prosecute the action, or becomes non-suit) to prove before the High Court that the defendant had good ground for believing either that the title to some corporeal or incorporeal hereditament, the yearly value of which exceeded £20, or some toll, market, fair, or franchise was in question, or that the rent or damage in respect of which the distress was taken or the value of the goods seized exceeded £20 (*ibid.*); see *Tummons* v. *Ogle* (1856), 6 E. & B. 571.

(*a*) See title COUNTY COURTS, Vol. VIII., p. 610. The power of removal does not apply to matters depending upon the bankruptcy jurisdiction of such county courts as possess bankruptcy jurisdiction (*Skinner* v. *Northallerton County Court Judge*, [1898] 2 Q. B. 680, C. A.; affirmed, [1899] A. C. 439). So far as regards such jurisdiction such county courts are a branch of the High Court of Justice (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 93, 94); and *certiorari* cannot be directed to them (*Skinner* v. *Northallerton County Court Judge, supra*). As to removal from the Mayor's Court, see title MAYOR'S COURT, LONDON.

(*b*) The word "indictment" is generic, including coroners' inquisitions, which are a species of indictments, and therefore statutes, rules, and case law with regard

Rules (*c*) made under statutory authority (*d*). These conditions are as follows:—

No indictment, except indictments against bodies corporate, not authorised to appear by solicitor in the court in which the indictment is preferred, may be removed into the High Court for trial, either at the instance of the prosecutor (other than the Attorney-General acting on behalf of the Crown) or of the defendant, unless it is made to appear to the court or judge that a fair and impartial trial cannot be had in the court below, or that some question of law of more than usual difficulty and importance is likely to arise upon the trial, or that a view of the premises in respect of which any indictment is preferred, or a special jury, may be required for a satisfactory trial (*e*).

Grounds for removal.

**355.** The probability that a fair and impartial trial cannot be had in the court below may arise from widespread prejudice amongst the class from which jurors are selected (*f*) or from

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to indictments apply also to coroners' inquisitions (*R.* v. *Ingham* (1864), 5 B. & S. 257). The conditions imposed by the Crown Office Rules, rr. 12—19, apply to the removal of coroners' inquisitions for trial, as also to the removal of presentments of commissioners of sewers, which are also a species of indictment.

(*c*) Crown Office Rules, 1906, rr. 12—19.

(*d*) The Judicature Act, 1875 (38 & 39 Vict. c. 77), ss. 17—25, enabled rules of court to be made for carrying out that Act and the Judicature Act, 1873 (36 & 37 Vict. c. 66), by Order in Council, upon the recommendation of the judges of the High Court, provided that such rules should be laid before Parliament and should be subject to be annulled on address from either House. By the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59), s. 6, the power to make rules of court under the above enactment was extended to all proceedings by or against the Crown. The Crown Office Rules appear to have been made under the powers thus conferred.

(*e*) Crown Office Rules, 1906, r. 13 (substantially reproducing the Criminal Procedure Act, 1853 (16 Vict. c. 30), s. 4).

(*f*) *R.* v. *Hunt* (1820), 3 B. & Ald. 444, where, on a charge of conspiracy arising out of a meeting held by the defendants and others which had been dispersed by the Manchester and Salford Yeomanry, acting under the direction of the Lancashire magistrates, strong popular feeling had been aroused in the county, and the case was removed by *certiorari* and was subsequently ordered to be tried in the county of York; *R.* v. *Lever* (1838), 1 Will. Woll. & H. 35, where, on an indictment for riot, which arose out of an obstruction in the streets caused by open-air preaching, and which had been the subject of partisan articles in the county press, *certiorari* was granted; *R.* v. *Palmer* (1856), 5 E. & B. 1024, where an indictment for murder by poisoning, the case having aroused extraordinary excitement in Staffordshire, in which county the crime was committed, was removed by *certiorari*, and was subsequently ordered to be tried at the Central Criminal Court; *R.* v. *Bell* (1859), 8 Cox, C. C. 287, where, three persons having been killed in riots during a contested election, and on the inquest upon these persons the coroner's jury having found a verdict of manslaughter against the defendants and a party of police, the jurors would probably be persons who had taken a warm interest in the election, and local newspapers had published articles containing violent attacks on the police, *certiorari* was granted with a view to enable an application to be made to change the venue; *R.* v. *Whittaker* (1895), 59 J. P. 197, where, on an indictment before borough sessions for obtaining goods by false pretences against a bankrupt, by whose bankruptcy many persons in the borough had been losers, *certiorari* was granted. But see *Ex parte Lynes* (1846), 1 Saund. & C. 31, where, on an indictment for felony, it was alleged that the political opinions of the county in which the indictment was preferred were opposed to those entertained by the defendant, and that, owing to his active employment in political organisation,

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bias on the part of the court itself (*g*). If the number of persons on the jury list within the jurisdiction of the court below is small, this is an argument in favour of removal when local prejudice is shown to exist (*h*). But removal may be allowed even though the number of names on the list is large (*i*); and the probability of an impartial trial ought not to be allowed to depend on the exercise of the right of challenge (*k*).

Felonies.

The court is disinclined to remove felonies into the King's Bench Division for trial at *nisi prius* (*a*). But if a strong case of local prejudice be made out, the writ will be granted, whether the charge be one of felony or misdemeanour, in order that a further application may be made to change the venue to some other county (*b*).

Prejudice.

The mere fact that the defendant is a member of the bench of magistrates who are to try him is not in itself a sufficient ground for granting the writ (*c*); but where such a defendant endeavours

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he had incurred general dislike in the county, and that he had been subjected to abuse and threatened with violence, and *certiorari* was refused.

(*g*) *R.* v. *Jones* (1836), 2 Har. & W. 293; *R.* v. *Grover* (1840), 8 Dowl. 325; *Reban* v. *Trevor* (1840), 4 Jur. 292.

(*h*) *Garbett* v. *Ouseley* (1842), 6 Jur. 193.

(*i*) *R.* v. *Hunt* (1820), 3 B. & Ald. 444, where there were 8,700 names on the jury list; *R.* v. *Whittaker* (1895), 59 J. P. 197, where there were 20,000 names on the jury list.

(*k*) *R.* v. *Boughton*, [1895] 2 I. R. 386.

(*a*) *R.* v. *Reynolds* (1865), 12 L. T. 580, where the reason given for the disinclination of the court to remove felonies was that on removal the cause would in the ordinary course be tried at *nisi prius*, where the course of procedure was inconvenient in the case of felonies and precluded the defendant from taking the opinion of the Court for Crown Cases Reserved, and it was suggested that application should be made to the recorder of the borough session before which the defendant was indicted to send the case to assizes.

(*b*) The Attorney-General may demand a change of venue as of right; and when all the inhabitants of a county are indicted the venue will be changed as of right (*R.* v. *Southampton County* (*Inhabitants*) (1886), 17 Q. B. D. 424), otherwise it must be shown that a fair and impartial trial cannot be had without a change of venue (*R.* v. *Palmer* (1856), 5 E. & B. 1024; *R.* v. *Bell* (1859), 8 Cox, C. C. 287; *R.* v. *Whittaker*, *supra*; *R.* v. *Hunt*, *supra*; *R.* v. *Simpson* (1841), 5 Jur. 462; *R.* v. *Dunn* (1847), 11 Jur. 287; *R.* v. *Moross* (1891), 7 T. L. R. 507). Compare *R.* v. *Penprase* (1833), 4 B. & Ad. 573, where application was made to remove an indictment for felony from Cornwall to another county, on the ground that titles to duchy property with regard to which prejudice existed in Cornwall might come in question, but the court refused the application; *R.* v. *Holden* (1833), 5 B. & Ad. 347, where, the defendants being charged with an unnatural crime and indicted in the county of Suffolk, the case was removed into the superior court by *certiorari*, and application was made to change the venue to another county on the ground that there was a strong prejudice against the defendants on the subject of this charge throughout Suffolk, but the court refused to change the venue, and the indictment was tried at the Suffolk Assizes as a *nisi prius* cause. The application may be made on the ground that a view in another county than that in which the venue is laid is necessary (*Clerk* v. *R.* (1861), 9 H. L. Cas. 184; *R.* v. *Sheldon* (1875), 32 L. T. 27). When the venue is changed, it is usual to send the case to the nearest county on the same circuit (*R.* v. *Browne* (1842), 6 Jur. 168); but it may be sent if necessary to any other county (*R.* v. *Palmer*, *supra*, *per* Lord CAMPBELL, C.J., at p. 1028). The venue of an indictment preferred at an assize court may be changed by an order of the judge there sitting without writ of *certiorari*. As to venue generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 279.

(*c*) *R.* v. *Fellowes* (1836), 4 Dowl. 607.

to influence his colleagues before the case is heard the writ will be granted (*d*). An allegation of personal prejudice on the part of a chairman of quarter sessions against a defendant who is to be tried before such sessions is not sufficient to warrant the issue of the writ (*e*). But the relationship of a defendant to a member of the bench before which such defendant is to be tried is a circumstance which may have weight in inducing the court to grant *certiorari* (*f*).

Indictments at sessions.

**356.** Indictments may be removed from sessions on the ground that difficult points of law are likely to arise (*g*), but they will not be removed from assizes (*h*), or from the Central Criminal Court (*i*), on this ground alone, inasmuch as His Majesty's judges preside there, as in the King's Bench Division. In applying for the writ it is not enough for the applicant to allege that difficult points of law are likely to arise (*k*) or to state that he is advised that this is the case (*l*). He must specify what the points of difficulty are (*m*).

Special jury or view.

**357.** *Certiorari* to remove an indictment for trial in order that it may be tried by a special jury, or in order that the jury may have a view of the premises in respect of which the indictment is preferred, is not granted unless it is shown that a special jury or a view is necessary for the purpose of securing a satisfactory trial (*n*).

Recognisances.

**358.** The writ, although granted, becomes inoperative unless the party, whether prosecutor or defendant, at whose instance it has

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(*d*) *R.* v. *Grover* (1840), 8 Dowl. 325, where the defendant had issued a circular to his brother magistrates with regard to the charges against him.

(*e*) *R.* v. *Jacobs* (1839), 3 Jur. 999; and see *R.* v. *Renshaw* (1841), 5 Jur. 801, where the defendant alleged that the chairman of the sessions was an intimate friend of the father of the prosecutrix, but the writ was refused.

(*f*) *Reban* v. *Trevor* (1840), 4 Jur. 292, where the son of an influential magistrate was indicted with another person before the bench of which his father was a member for obtaining money under false pretences; and see *R.* v. *Jones* (1836), 2 Har. & W. 293, where gamekeepers in the employ of a magistrate were indicted for assault before the bench of which he was a member, and it was alleged that in committing the assault they acted under the instructions of his son.

(*g*) *R.* v. *Bird* (1845), 2 Dow. & L. 939, where a view was also required; *R.* v. *Jeffs* (1845), 9 Jur. 580, where the prosecution was of an unusual character; the officers of the Crown were to attend to prosecute, and the defendant desired to have a special jury. Compare *Clark* v. *Willington* (1843), 7 Jur. 44, where the indictment was for assault arising out of a claim to property with regard to which questions of law might arise, and the defendant desired to have a special jury, but *certiorari* was refused.

(*h*) *R.* v. *Morton* (1842), 1 Dowl. (N. S.) 543.

(*i*) *R.* v. *Templar* (1836), 1 Nev. & P. (K. B.) 91. But in *R.* v. *Wartnaby* (1835), 2 Ad. & El. 435, the writ was granted in the case of an indictment at the Central Criminal Court involving points of law arising out of proceedings in Chancery; and see *R.* v. *Josephs* (1839), 8 Dowl. 128.

(*k*) *R.* v. *Jowl* (1836), 1 Nev. & P. (K. B.) 28; *R.* v. *Hodges* (1845), 9 Jur. 665; *R.* v. *Josephs*, *supra*.

(*l*) *R.* v. *Harrison* (1819), 1 Chit. 571.

(*m*) *R.* v. *Jowl*, *supra*; *R.* v. *Hodges*, *supra*; *R.* v. *Josephs*, *supra*; *R.* v. *Harrison*, *supra*.

(*n*) In the following cases application was made for the writ either wholly or partly on the ground that a special jury or a view of the premises was necessary:—*R.* v. *Tradgeley* (1732), 1 Sess. Cas. (K. B.) 180 *R.* v. *Bird*, *supra*; *R.* v. *Jeffs* (1845),

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been granted enters into a recognisance in such sum, and with such sureties as the court or judge granting the writ may direct, to proceed to trial and to pay the costs of the removal of the indictment in case the decision is adverse to such party (*o*). Where the removal of an indictment for trial is effected by an order in the nature of *certiorari* instead of by the writ itself, the conditions above mentioned must equally be observed (*p*).

*Certiorari* to quash.

**359.** *Certiorari* to quash the determination of any inferior court can only be granted subject to conditions imposed by the Crown Office Rules (*q*) made under statutory authority (*r*).

(c) *Effect of Restriction by Statutory Conditions.*

Conditions precedent and subsequent.

**360.** Where conditions precedent imposed by statute are not complied with, the superior court has no power to grant the writ, even, it seems, if the court below has acted wholly without jurisdiction (*s*). Where conditions subsequent (*t*) are not complied with, the writ becomes nugatory, and is not to be obeyed by the court below.

Indictments.

The conditions relating to the removal of indictments for trial apply by express words to a prosecution *pro rege* (*u*).

The conditions relating to the removal of indictments and convictions for the purpose of quashing them contain no such express words, nor is there shown a clear intention that the prosecutor *pro rege* should be barred by them (*a*). *Certiorari* may therefore be granted on the application of the prosecutor to remove an indictment or conviction in order to quash it, although he

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9 Jur. 580; *Clark* v. *Willington* (1843), 7 Jur. 44; and *R.* v. *Morton* (1842), 1 Dowl. (N. S.) 543.

(*o*) Crown Office Rules, 1906, rr. 14, 15 (substantially reproducing stat. 5 & 6 Will. & Mar. c. 11, s. 2, and stat. 8 & 9 Will. 3, c. 33). As to these recognisances, see p. 204, *post*.

(*p*) Crown Office Rules, 1906. r. 17.

(*q*) *Ibid.*, rr. 20—30; and see pp. 207 *et seq.*, *post*.

(*r*) See note (*d*) on p. 181, *ante*.

(*s*) See *Skinner* v. *Northallerton County Court Judge*, [1898] 2 Q. B. 680, C. A.; affirmed [1899] A. C. 439, where *certiorari* was applied for to quash an order made by a county court judge in a bankruptcy matter, which order was alleged to have been issued without jurisdiction, and the writ was refused on the ground that for the purpose of bankruptcy jurisdiction the county court judge was a judge of the High Court; but the court was prepared to hold (see *per* Lord HALSBURY, L. C., at p. 441) that the writ would not lie because the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 124, prohibited the issue of a *certiorari* except as mentioned in that Act. In *R.* v. *Lloyd*, [1906] 1 K. B. 22, affirmed [1906] 1 K. B. 552, C. A., an application for *certiorari* to quash the judgment of a deputy county court judge, as having been made without jurisdiction, was heard without objection being taken on this ground, but the application was refused on the merits.

(*t*) The condition as to service of the writ on the judge of a local court of record before joinder of issue or the swearing of the jury (see p. 179, *ante*) and the conditions as to entering into recognisances in any case in which they are required (see p. 183, *ante*) are conditions subsequent. All the other statutory conditions are conditions precedent.

(*u*) Crown Office Rules, 1906, rr. 13, 15.

(*a*) *Ibid.*, rr. 21, 22, 24. R. 21 reproduces stat. (1739) 13 Geo. 2, c. 18, s. 5; and r. 24 reproduces stat. (1731) 5 Geo. 2, c. 19, s. 2. The cases referred to in the next two notes were decided on the construction of these statutes.

has not complied with statutory conditions as to notice or otherwise (*b*); and the writ must be allowed in the court below, although he has not entered into recognisances subsequently to the granting of the order absolute (*c*). Where, however, a prosecutor applies for *certiorari* to remove an indictment in order to quash it, the court may in its discretion require him to give security for costs, or may impose other terms upon him (*d*).

(v.) *At what Stage in the Proceedings of the Inferior Court Certiorari is available.*

(a) *Inferior Courts of Civil Jurisdiction.*

Local courts.

**361.** The writ of *certiorari* is not effectual for the purpose of removing an action from a local court of record (*e*) of common law jurisdiction for trial unless—(1) it is delivered to the judge or officer of the inferior court before issue or demurrer joined, provided that issue or demurrer be not joined within six weeks after the appearance of the defendant (*f*); or (2) unless it is so delivered before any juryman is sworn (*g*). Where issue or demurrer are joined within six weeks after the appearance, then the second of these provisions takes effect, and the writ is in time if it is served before any juryman is sworn (*h*).

In the case of judgment by default neither of these provisions is applicable, and a writ of *certiorari* to remove the cause for trial may be served at any time before a jury have assessed damages upon a writ of inquiry (*i*).

These provisions do not apply to the removal of a cause from a local court of record of equity jurisdiction (*k*). Such a cause may, it is conceived, be removed for trial at any time before final judgment.

County courts.

**362.** Any cause or matter, whether of common law or equity, may be removed from a county court for trial at any stage of the proceedings before final judgment (*l*).

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(*b*) *R.* v. *Farewell* (1744), 2 Stra. 1209 (no affidavit of service of notice); *R.* v. *Battams* (1801), 1 East, 298 (no notice).

(*c*) *R.* v. *Farewell*, *supra*; *Ex parte Spencer* (1839), 1 Per. & Dav. 358.

(*d*) *R.* v. *Wynn* (*Dr.*) (1802), 2 East, 226; *R.* v. *Webb* (1764), 3 Burr. 1468; *R.* v. *Glenn* (1820), 3 B. & Ald. 373.

(*e*) For a list of the principal local courts of record, see title COURTS, Vol. IX., pp. 138 *et seq.*

(*f*) Stat. (1623) 21 Jac. 1, c. 23, s. 2. As to what constitutes joinder of issue, see *Bruce* v. *Wait* (1837), 3 M. & W. 15.

(*g*) Stat. (1601) 43 Eliz. c. 5.

(*h*) *Cox* v. *Hart* (1759), 2 Burr. 758.

(*i*) *Walker* v. *Gann* (1826), 7 Dow. & Ry. (K. B.) 769; *Godley* v. *Marsden* (1830), 4 Moo. & P. 138; *Smith* v. *Sterling* (1835), 3 Dowl. 609; *Cox* v. *Hart*, *supra*.

(*k*) See p. 157, *ante*.

(*l*) *Re East Dulwich No.* 295 *Starr-Bowkett Building Society* (1890), 39 W. R. 32. Where an order *nisi* or a summons for a writ of *certiorari* to remove a cause or matter from the county court has been granted, this operates, if the High Court or a judge thereof so directs, as a stay of proceedings in the action or matter until the determination of the order or summons, or until the High Court or a judge thereof otherwise orders; and the judge of the county court must from time to time adjourn the trial of the action or matter accordingly (County Courts Act,

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**363.** After final judgment a cause cannot be removed by *certiorari* from an inferior court for any other purpose than execution (*m*).

After judgment.

(b) *Indictments and Inquisitions.*

Indictments.

**364.** An application to remove an indictment or inquisition for trial may be made even before it is found (*n*); and the writ is in time if it is served on the judge or officer of the inferior court at any time before the case is actually called on (*o*).

Application for the purpose of quashing an indictment or inquisition may be made at any time after it is found and before trial (*p*), and the writ, in this case also, is in time if it is served before the cause is actually called on (*q*).

After verdict.

After verdict and before judgment an application for *certiorari* to quash will not be granted, for, although error did not lie at this stage (*r*), the applicant, having taken his chance of securing a favourable verdict, will not be assisted by the court (*s*). Nor will *certiorari* be granted for the purpose of moving in arrest of judgment (*a*). After verdict, however, an indictment and the proceedings thereon may be removed for judgment (*b*).

After judgment an indictment cannot be removed for the purpose of quashing it (*c*), nor for the purpose of applying for a new trial (*d*); but it may be removed, together with the proceedings thereon, to have sentence executed in the superior court (*e*).

(c) *The Determinations of Justices.*

Orders of justices.

**365.** *Certiorari* to quash the determinations of justices must be applied for within six calendar months next after the determination

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1888 (51 & 52 Vict. c. 43), s. 129). If the party who has obtained the order *nisi* or the summons does not serve a copy of it on the opposite party and on the registrar of the county court two clear days before the day fixed for trial, the county court judge may order the party who has obtained such order or summons to pay the costs of the day (*ibid.*). And so also if the writ has been obtained *ex parte* the party obtaining it may be ordered to pay the costs of the day, unless he lodges the writ and gives notice to the opposite party that it has been issued two clear days before the day fixed for the trial (*ibid.*, s. 130).

(*m*) *Lawes* v. *Hutchinson* (1835), 3 Dowl. 506, *per* PARKE, B., at p. 508.

(*n*) *R.* v. *Palmer* (1856), 5 E. & B. 1024.

(*o*) *R.* v. *Pasman* (1834), 2 Dowl. 529.

(*p*) *R.* v. *Penegoes* (*Inhabitants*) (1822), 2 Dow. & Ry. (K. B.) 209; *R.* v. *Webb* (1764), 3 Burr. 1468. On motion in the court below a defendant has been allowed to move to quash an indictment after the case for the prosecution has closed (*R.* v. *James* (1872), 12 Cox, C. C. 127).

(*q*) *R.* v. *Seton* (*Inhabitants*) (1797), 7 Term Rep. 373; *R.* v. *Pasman*, *supra*.

(*r*) See note (*i*), p. 161, *ante*.

(*s*) *R.* v. *Penegoes* (*Inhabitants*), *supra*.

(*a*) *R.* v. *Jackson* (1795), 6 Term Rep. 145.

(*b*) See p. 159, *ante*.

(*c*) *Rice* v. *R.* (1616), Cro. Jac. 404; *R.* v. *Penegoes* (*Inhabitants*), *supra*; *R.* v. *Seton* (*Inhabitants*), *supra*; *R.* v. *Christian* (1842), 12 L. J. (M. C.) 26; *Nally* v. *R.* (1884), 15 Cox, C. C. 638; *R.* v. *Boaler* (1892), 67 L. T. 354.

(*d*) *R.* v. *Oxford County* (*Inhabitants*) (1811), 13 East, 411.

(*e*) See p. 164, *ante*.

complained of (*f*). This rule applies to all applications to quash (*g*).

Appeals.

Although there may be an appeal from an order of justices to quarter sessions, a dissatisfied party may nevertheless apply to the King's Bench Division for a writ of *certiorari* instead of appealing (*h*), but he cannot do so until the time for appealing has expired (*i*), and pending an appeal the writ will not be issued (*k*). Where there has been an appeal to quarter sessions from an order of justices, and the appeal has been determined, the writ of *certiorari* may be applied for to remove either the original order or the order made upon appeal or both. Where the order made upon appeal confirms the original order, and only the order made upon appeal is removed by *certiorari* and quashed, the original order remains valid (*l*).

SUB-SECT. 4.—*Jurisdiction to grant Certiorari.*

(i.) *By what Courts the Writ is granted.*

Original jurisdiction.

**366.** The House of Lords has jurisdiction to issue a writ of *certiorari* to any court in which an indictment has been found against a peer for treason or felony, requiring such indictment to be removed into the High Court of Parliament or into the Court of the Lord High Steward (*m*).

High Court.

All other original jurisdiction to grant the writ of *certiorari* now resides in the High Court of Justice (*n*), any division of which may

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(*f*) Crown Office Rules, 1906, r. 21. Where an order of quarter sessions is made subject to a special case, the period of six calendar months runs from the date of the order, and not from the date when the special case is signed (*Elliot* v. *Thompson* (1875), 33 L. T. 339).

(*g*) Crown Office Rules, 1906, r. 30.

(*h*) *R.* v. *Blathwayt* (1846), 3 Dow. & L. 542.

(*i*) Crown Office Rules, 1906, r. 29; and see *R.* v. *Blathwayt*, *supra*. The rule only applies where the time for appealing is limited by statute (*Warwick* (*Borough*) *Case* (1734), 2 Stra. 991).

(*k*) Crown Office Rules, 1906, r. 29; and see *R.* v. *Sparrow* (1787), 2 Term Rep. 196, n.

(*l*) *Suffolk County Lunatic Asylum* v. *Stow Union Guardians* (1897), 76 L. T. 494, where the order of quarter sessions was quashed upon a technical point and not upon the merits.

(*m*) *Scotch Rebels Case* (1746), Fost. 1, where indictments for treason against the Earls of Kilmarnock and Cromartie and Lord Balmerino, found before a special commission of oyer and terminer, were removed by *certiorari* into Parliament; *Kingston's* (*Duchess*) *Case* (1776), 1 Leach, 146, where, on the Duchess of Kingston being indicted before an inferior court for treason, Lord MANSFIELD, C.J., granted the writ of *certiorari* to remove the indictment into the King's Bench, but this writ was superseded, and another writ of *certiorari* was issued by direction of the House of Lords to remove the proceedings before the King in Parliament; see also *Russell* (*Trial of Earl*), [1901] A. C. 446, where an indictment for bigamy, found against a peer at the Central Criminal Court, was removed into the House of Lords for trial before the Court of the Lord High Steward.

(*n*) *Certiorari* originally issued only out of the ordinary or common law Court of Chancery (Sheppard's Epitome, 862). The common law jurisdiction of Chancery preceded its extraordinary, or equitable, jurisdiction. The Chancery was the central office of all the courts, and out of it issued all original writs—that is, all writs for commencing or removing actions (4 Co. Inst. 80). The writ of *certiorari* to remove the records of other courts for any

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exercise any part of the jurisdiction of the High Court (*o*), subject,

purpose was issued out of Chancery. It was issued to "superior" courts for ancillary purposes, as where the record of such a court was required in evidence in another court, whether superior or inferior (see note (*o*), p. 166, *ante*), or in aid of error (see note (*d*), p. 157, *ante*). It was issued also to inferior courts in order to remove actions from them or to revise their proceedings (Sheppard's Epitome, 862). The ordinary Court of Chancery did not, however, itself deal with the records thus transmitted to them. If such records were required in evidence, exemplifications under the Great Seal were sent by *mittimus* to the court in which they were so required. Records removed for other purposes were transferred by *mittimus* into the King's Bench, the Common Pleas, or the Exchequer, according to their subject-matter, to be there dealt with. When Chancery acquired its equity jurisdiction, however, suits from inferior courts of equitable jurisdiction, when removed by writ of *certiorari*, were retained in the Court of Chancery to be dealt with on the equity side.

By the time of Queen Elizabeth the Court of Queen's Bench had established its right equally with the Court of Chancery to issue the writ of *certiorari* to inferior courts of common law jurisdiction, whether civil or criminal, and whether for the purpose of removing the proceedings of such courts or quashing them (see *Butcher and Aldworth's Case* (1601), Cro. Eliz. 821), and to have the records of such courts returned directly to itself (*ibid.*). The right of the Court of Common Pleas to issue the writ was still a matter of dispute as late as 1718 (Fitz. Nat. Brev., 6th ed., p. 537); and it never secured the right except so far as related to the removal of causes from courts of civil jurisdiction. At an early period the Court of Exchequer acquired power to issue the writ in cases relating to the revenue (see *Churton* v. *Wilkin*, [1884] W. N. 62). But as late as 1828 it could not issue the writ for any other purpose (Tidd's Practice (1828), p. 397). A little later, however, it obtained the same jurisdiction in *certiorari* as the Court of Common Pleas (see Archbold's Practice (1847), p. 452).

Statutory jurisdiction to issue *certiorari* to remove the judgments of inferior courts for execution in the High Court was in 1777 and 1837 (see p. 163, *ante*) conferred on, and was confined to, the three superior courts of common law.

Writs of *certiorari* were not, it would seem, originally issued out of Chancery as of course (see Gilbert, Replevin, p. 137). But this became the practice from very early times (*ibid.*), and any objection which might be raised to the issue of the writ, or to its form, was taken upon motion to quash the writ or upon *procedendo*. An exception existed to the practice. The writ was never granted by the Court of Chancery to an inferior court of equitable jurisdiction without cause shown (see note (*b*), p. 157, *ante*). During the seventeenth century the King's Bench began to refuse to issue *certiorari* to assizes or sessions without cause shown; and various restrictions and conditions were imposed by statute upon the issue of the writ (see p. 178, *ante*). Suitors in some cases endeavoured to evade these obstacles by obtaining the writ out of Chancery upon simple application to the Cursitors' Office. It was held, however, by the Lord Chancellor (*Pierce* v. *Thomas* (1821), Jac. 54) that where the writ was applied for in Chancery in respect to common law proceedings it could only be granted in accordance with common law rules; and he quashed a writ which had been issued as of course; see also *Edwards* v. *Bowen* (1826), 2 Sim. & St. 514. But the writ could only be issued out of Chancery by a Chancery judge; and a writ so issued by order of a common law judge was quashed as irregular (*Worthington* v. *Remnant* (1840), 10 Sim. 558).

A large part of the business of the Cursitors' Office consisted in issuing the writ of *certiorari* to remove records for the purpose of evidence. For this purpose it was always sufficient that the tenor of the record should be removed (see note (*o*), p. 166, *ante*). Hence, about the middle of the eighteenth century (see Gilbert, Execution, 145) it became unusual in the Chancery to require anything more than the tenor of the record to be removed in any case. This practice was corrected by an express decision of the Court of Chancery (*Woodcraft* v. *Kinaston* (1742), 2 Atk. 317, 318). But the same point required deciding again in *Pierce* v. *Thomas*, *supra*.

(*o*) *The Recepta*, [1893] P. 255, C. A.

however, to any express provision of the Rules of the Supreme Court or of the Crown Office (*p*).

Jurisdiction on appeal.

**367.** There is a right of appeal to a judge in chambers from the decision of a master in the King's Bench Division granting or refusing the writ of *certiorari*, and to a divisional court from a judge in chambers in the King's Bench Division.

An appeal lies to the Court of Appeal from a decision of a judge of the Chancery Division granting or refusing the writ of *certiorari* in an equity action or matter.

King's Bench Division.

An appeal lies from a decision of the King's Bench Division granting or refusing the writ of *certiorari* to the Court of Appeal, except in cases which are of a criminal character (*a*). Thus, no appeal lies from the refusal of the King's Bench Division to grant the writ of *certiorari* to remove an indictment for trial (*b*), nor from its refusal to quash upon *certiorari* a conviction for trespassing in pursuit of game (*c*), or an order for the restitution of stolen property (*d*). Nor does an appeal lie from a decision of the King's Bench Division granting a *certiorari* to bring up an order of justices requiring an owner of property to abate a nuisance (*e*).

Leave to appeal.

**368.** The refusal of the King's Bench Division to grant a rule *nisi* for the writ of *certiorari* (*f*), or the discharge by that court of a rule *nisi* after argument (*g*), is an "order" which in matters not criminal may be appealed against. The leave of the King's Bench Division is not required for an appeal against such orders (*h*). But where the King's Bench Division has quashed an order brought before it on *certiorari* from an inferior court, it seems that leave to appeal from the decision of the King's Bench Division to the Court of Appeal is necessary (*i*).

(ii.) *Discretion of the Court to grant the Writ.*

(a) *When the Writ is granted as of Course.*

*Certiorari* as of course.

**369.** The writ of *certiorari* is granted as of course upon the application of the Attorney-General, acting on behalf of the Crown,

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(*p*) As to the statutory authority under which these rules were made, see note (*d*) on p. 181, *ante*, and for procedure, see pp. 199 *et seq.*, *post*.

(*a*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47. The exception in the section—"save for some error of law apparent upon the record"—no longer exists, since proceedings in error are abolished (see Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 433).

(*b*) *R.* v. *Rudge* (1886), 16 Q. B. D. 459, C. A.

(*c*) *R.* v. *Fletcher* (1876), 2 Q. B. D. 43, C. A.

(*d*) *R.* v. *Central Criminal Court Justices* (1886), 18 Q. B. D. 314, C. A.

(*e*) *Ex parte Whitchurch* (1881), 6 Q. B. D. 545.

(*f*) *R.* v. *Farmer*, [1892] 1 Q. B. 637, C. A.

(*g*) *Walsall Overseers* v. *London and North Western Rail. Co.* (1878), 4 App. Cas. 30; *R.* v. *Pemberton* (1879), 5 Q. B. D. 95, C. A.; *R.* v. *Brighton Corporation* (1907), 23 T. L. R. 440, C. A.; *R.* v. *Woodhouse*, [1906] 2 K. B. 501, C. A.; and see *R.* v. *Galway Justices*, [1906] 2 I. R. 446.

(*h*) By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 45, appeals from inferior courts to a divisional court are to be final, unless special leave to appeal to the Court of Appeal is given by the divisional court.

(*i*) *R.* v. *Pemberton*, *supra*, *per* BRETT, L.J., at pp. 97, 98.

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in all cases in which the court has jurisdiction over the subject-matter of the proceedings in the inferior court (*k*). And this is the case although *certiorari* is taken away by statute (*l*), or although the issue of the writ has been made subject to statutory conditions which have not been complied with (*m*).

Prosecutors.

The writ is not now, as formerly, granted as of course on the application of a prosecutor *pro rege*. But prosecutors *pro rege* are exempt, unless a contrary intention is manifested, from the operation of statutes by which *certiorari* is taken away (*n*) or restricted by conditions (*o*).

Removal for trial.

*Certiorari* to remove for trial from local courts of record of common law jurisdiction (*p*) which are not subject to the Borough and Local Courts of Record Act, 1872 (*q*), is granted as of course, subject to compliance with statutory conditions (*r*).

Replevin.

*Certiorari* to remove actions of replevin for trial from county courts is granted as of course, subject to compliance with conditions imposed by the County Courts Act, 1888 (*a*).

Removal for execution.

*Certiorari* to remove the judgments of local courts of record for execution (*b*) is granted as of course on proper affidavit (*c*), and so also when the writ is requisite for the purpose of producing a record in evidence (*d*) or for the purpose of bringing up depositions upon applications for bail (*e*).

Articles of the peace etc.

*Certiorari* is issued as of course, without motion or summons, to remove articles of the peace in order that attachment may issue upon them (*f*), or to remove orders of sessions where a case has been stated and the parties consent to the issue of the writ (*g*), or to remove convictions on indictments at common law in relation to the non-repair or obstruction of highways, public bridges, or navigable rivers (*h*), where an

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(*k*) *R.* v. *Eaton* (1787), 2 Term Rep. 89; *R.* v. *Clace* (*Inhabitants*) (1769), 4 Burr. 2456; *R.* v. *Thomas* (1813), 4 M. & S. 442; *Listowel* (*Lord*) v. *Irish Fisheries* (*Inspector*) (1875), 9 I. R. C. L. 46.

(*l*) *R.* v. *Clace* (*Inhabitants*), *supra*, *per* Lord MANSFIELD, C.J., at p. 2458; *R.* v. *Davies* (1794), 5 Term Rep. 626; *R.* v. —— (1815), 2 Chit. 136; *R.* v. *Allen* (1812), 15 East, 333; *R.* v. *Thomas*, *supra*; *Mountjoy* v. *Wood* (1856), 2 Jur. (N. S.) 452.

(*m*) *R.* v. *Berkley* (1754), 1 Keny. 80; *Churton* v. *Wilkin*, [1884] W. N. 62.

(*n*) *R.* v. *Cumberland* (*Inhabitants*) (1795), 6 Term Rep. 194; *R.* v. *Bodenham* (*Inhabitants*) (1774) 1 Cowp. 78; *R.* v. *Boultbee* (1836), 4 Ad. & El. 498; and see Crown Office Rules, 1906, rr. 13, 15, 21, 22, 24.

(*o*) *R.* v. *Farewell* (1744), 2 Stra. 1209; *R.* v. *Spencer* (1839), 9 Ad. & El. 485, and see p. 185, *ante*.

(*p*) For a list of the principal courts of record, see title COURTS, Vol. IX., pp. 138 *et seq.*

(*q*) 35 & 36 Vict. c. 86.

(*r*) See p. 178, *ante*.

(*a*) 51 & 52 Vict. c. 43, s. 137; see p. 180, *ante*.

(*b*) See p. 163, *ante*.

(*c*) The order is made *ex parte* on application to the master. As to the affidavit, see p. 212, *post*.

(*d*) See p. 166, *ante*.

(*e*) See p. 166, *ante*.

(*f*) Crown Office Rules, 1906, r. 254.

(*g*) *Ibid.*, r. 233 (m).

(*h*) *Ibid.*, r. 17A.

appeal is brought against such conviction under the Criminal Appeal Act, 1907 (*i*).

(b) *When the Writ is Discretionary.*

Discretion of court.

**370.** In cases other than those which have been mentioned the writ is discretionary. In the case of *certiorari* for the removal of actions for trial from local courts of record (*k*) of common law jurisdiction to which the Borough and Local Courts of Record Act, 1872 (*l*), has been applied (*m*), discretion has been expressly given to the High Court by statute (*n*); and so also in the case of *certiorari* for the removal of actions or matters (other than actions of replevin) for trial from county courts, and for the removal of judgments of such courts for execution (*o*). The removal of equity causes from local courts of record is discretionary (*p*).

The discretion of the court, upon applications for *certiorari* for the removal of indictments or inquisitions for trial, is limited by the Crown Office Rules (*q*) to certain specified grounds (*r*).

So far as relates to applications for *certiorari* to quash the determinations of inferior courts, when the jurisdiction to quash exists at common law (*s*) the discretion of the court is not limited by statute, but is exercised upon grounds established at common law (*t*). In the case of coroners' inquisitions, however, this discretion has been extended by statute (*a*).

Application by party aggrieved.

**371.** When the writ is discretionary it will nevertheless be granted *ex debito justitiæ*, to quash proceedings which the court has power to quash, where it is shown that the court below has acted without jurisdiction or in excess of jurisdiction (*b*), if the application is made by an aggrieved party and not merely by one of the public (*c*) and if the conduct of the party applying has not been such as to disentitle him to relief (*d*); and this is the case

(*i*) 7 Edw. 7, c. 23, s. 20 (3).

(*k*) For a list of the principal local courts of record, see title COURTS, Vol. IX., pp. 138 *et seq.*

(*l*) 35 & 36 Vict. c. 86.

(*m*) For a list of the courts to which the Act has been applied, see title COURTS, Vol. IX., p. 132, note (*b*).

(*n*) As to this discretion, see p. 157, *ante*.

(*o*) County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 124, 126, 137, 151.

(*p*) See note (*b*), p. 167, *ante*.

(*q*) Crown Office Rules, 1906, r. 13.

(*r*) As to these grounds, see p. 181, *ante*.

(*s*) Where *certiorari* is given by statute (see p. 173, *ante*), the statute itself in some cases confers a special discretion (see pp. 174, 175, *ante*).

(*t*) As to these grounds, see p. 192, *post*.

(*a*) See title CORONERS, Vol. VIII., p. 283.

(*b*) *R.* v. *Surrey Justices* (1870), L. R. 5 Q. B. 466; *R.* v. *Drury*, [1894] 2 I. R. 489; *R.* v. *Londonderry Justices*, [1905] 2 I. R. 318, C. A.

(*c*) *R.* v. *Surrey Justices, supra; R.* v. *Drury, supra; R.* v. *Londonderry Justices, supra; R.* v. *Surrey Justices* (1888), 52 J. P. 423; and see *R.* v. *Middlesex Justices* (1832), 3 B. & Ad. 938.

(*d*) *R.* v. *South Holland Drainage Committee* (1838), 8 Ad. & El. 429; *R.* v. *Sheward* (1880), 9 Q. B. D. 741, C. A.; *R.* v. *Manchester and Leeds Rail. Co.* (1838), 1 Per. & Dav. 164; *R.* v. *Yorkshire East Riding Justices* (1834), 3 Nev. & M. (K. B.) 93.

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even though *certiorari* is taken away by statute (*e*). The writ will never be granted to remove an erroneous order at the instance of the party in whose favour the error was made (*f*).

Where no benefit can be derived.

**372.** Where grounds are made out upon which the court might grant the writ, it will not do so where no benefit could arise from granting it (*g*), and where the proceedings in the court below are not merely voidable, but absolutely void, as where an unauthorised person has purported to act in a judicial capacity (*h*) or where such proceedings have become void by the operation of a statute (*i*), *certiorari* will not be granted.

Statutory discretion.

**373.** Where *certiorari* is the creature of statute (*k*) the discretion of the court depends upon the terms of the statute. The discretion to be exercised may be of the same character as that which is exercised where *certiorari* is granted at common law (*l*), or the court may be given power to determine whether the decision of the court below was right in law and in fact (*m*), so that the writ is in effect the machinery of an appeal.

(iii.) *Grounds for Certiorari to quash generally* (*n*).

(a) *Defect of Jurisdiction from the Nature of the Case.*

Want of jurisdiction.

**374.** Where the court below has acted without jurisdiction *certiorari* to quash the proceedings may be granted. Want of

(*e*) *R.* v. *Wood* (1855), 5 E. & B. 49; *Ex parte Bradlaugh* (1878), 3 Q. B. D. 509; *R.* v. *St. Albans Justices* (1853), 22 L. J. (M. C.) 142; *R.* v. *Somersetshire Justices* (1826), 5 B. & C. 816; *R.* v. *Cheltenham Commissioners* (1841), 1 Q. B. 467.

(*f*) *R.* v. *Denbighshire Justices* (1853), 1 C. L. R. 239.

(*g*) *R.* v. *Newborough* (1869), L. R. 4 Q. B. 585, 589; *R.* v. *Bristol and Exeter Rail. Co.* (1839), 11 Ad. & El. 202; *R.* v. *Lancaster and Preston Rail. Co.* (1845), 6 Q. B. 759; *R.* v. *Unwin* (1839), 7 Dowl. 578.

(*h*) *Re Daws* (1838), 8 Ad. & El. 936.

(*i*) *Weston* v. *Sneyd* (1857), 1 H. & N. 703.

(*k*) See p. 173, *ante*.

(*l*) In *certiorari* to quash orders of the Local Government Board (Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), ss. 105, 106), the discretion of the court is exercised on the same principles as in the case of orders of justices (*Re Newport Union*, *R.* v. *Poor Law Commissioners* (1837), 6 Ad. & El. 54; *R.* v. *Local Government Board*, [1901] 1 K. B. 210, C. A.).

(*m*) In *certiorari* to quash orders for the payment of money out of a borough fund or county fund (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 141; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 80), or to quash the allowance, disallowance, or surcharge of a district auditor (Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 35; and see the other Acts relating to the accounts of district auditors, p. 174, *ante*, and title LOCAL GOVERNMENT), or to quash the decision of the Board of Agriculture and Fisheries (exercising the jurisdiction formerly vested in the Tithe Commissioners) respecting parish boundaries (Tithe Act, 1837 (7 Will. 4 & 1 Vict. c. 69), s. 3), the court has to decide whether the decision of the court below is right or wrong, and may quash that decision either for error in law or on the facts. See *R.* v. *Brighton Corporation, Ex parte Shoosmith* (1907), 96 L. T. 762, C. A. (payment out of borough fund); *R.* v. *Roberts*, [1908] 1 K. B. 407, C. A. (district auditor); *Re Dent Tithe Commutation* (1845), 8 Q. B. 43 (parish boundaries). For the grounds on which removal for trial will be allowed, see pp. 173—175, *ante*.

(*n*) In all cases in which the court has power to quash on *certiorari* the writ may be granted for that purpose on the grounds referred to in this section. There seems to be no foundation for the doubt expressed in *R.* v. *Sheward*

jurisdiction may arise from the nature of the subject-matter; so that the inferior court had no authority to enter on the inquiry (*o*), or upon some part of it (*p*). It may also arise from the absence of some essential preliminary proceeding. Thus, although the inferior court may have jurisdiction over the subject-matter of the inquiry, it may be a condition precedent to the exercise of its jurisdiction that some step should have been previously taken by the person who institutes proceedings before the court (*q*). Under various statutes certain notices are requisite before the commencement of proceedings; and the omission to serve such notices deprives the inferior court of jurisdiction and affords ground for *certiorari* (*r*).

Collateral facts.

**375.** The case is more difficult where the jurisdiction of the court below depends, not upon some preliminary proceeding, but upon the existence of some particular fact. If the fact be collateral to the actual matter which the lower court has to try, that court cannot, by a wrong decision with regard to it, give itself jurisdiction which it would not otherwise possess (*s*). The lower court

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(1880), 9 Q. B. D. 741, C. A., *per* BRAMWELL, L.J., at p. 743, whether the court has power to quash an inquisition under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), for anything but error upon its face; see *Re Penny and South Eastern Rail. Co.* (1857), 7 E. & B. 660. There are, however, special considerations affecting applications for *certiorari* to quash indictments and coroners' inquisitions; see p. 60, *ante*.

(*o*) *Ex parte Bradlaugh* (1878), 3 Q. B. D. 509; *R.* v. *St. Albans Justices* (1853), 22 L. J. (M. C.) 142; *R.* v. *Wood* (1855), 5 E. & B. 49; *R.* v. *Badger* (1856), 6 E. & B. 137. The jurisdiction of justices upon articles of the peace depends on the oath of the applicant that he goes in fear and in danger of personal violence by reason of threats; and if in the absence of an oath to this effect on the part of the applicant the defendant is ordered to enter into recognisances, *certiorari* may be granted to quash them (*R.* v. *Dunn* (1840), 4 Per. & Dav. 415).

(*p*) *Re Penny and South Eastern Rail. Co., supra.*

(*q*) *R.* v. *Somersetshire Justices* (1825), 6 Dow. & Ry. (K. B.) 469.

(*r*) *R.* v. *Arkwright* (1848), 12 Q. B. 960; *R.* v. *Bedfordshire Justices* (1839), 11 Ad. & El. 134; *R.* v. *Eaves* (1870), L. R. 5 Exch. 75; *R.* v. *Lee* (1888), 52 J. P. 344; *R.* v. *Farmer*, [1892] 1 Q. B. 637, C. A. But see *R.* v. *Yorkshire East Riding Justices* (1834), 3 Nev. & M. (K. B.) 93, where, however, the notice was required by a rule of sessions only, and the other party had by his conduct waived the defect; *Ex parte Hopwood* (1850), 15 Q. B. 121.

(*s*) *Banbury* v. *Fuller* (1853), 9 Exch. 111 (see *per* COLERIDGE, J., at p. 140: "Suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having occurred within it, but the party charged contends that it arose within another hundred, this is clearly a collateral matter independent of the merits"); *Re Bailey* (1854), 3 E. & B. 607, where, on a charge of absenting himself from service, the question whether the defendant was a servant was held to be collateral; *Re Baker* (1857), 2 H. & N. 219 (same point); *Milward* v. *Caffin* (1779), 2 Wm. Bl. 1330, where, on a question of the assessment of land, the occupancy of the land by persons assessed was held to be a collateral fact; *Liverpool Gas Co.* v. *Everton* (1871), L. R. 6 C. P. 44, where the question as to what are the next practicable sessions for an appeal was held to be collateral to the hearing of the appeal; *Stanhope* v. *Thorsby* (1866), L. R. 1 C. P. 423, where, on an information for removing cattle without a licence, the question whether a licence was legally valid was held collateral; the justices, however, had inquired into the sufficiency of the evidence on which the licence had been granted, which was a matter clearly beyond their jurisdiction; *R.* v. *Manchester Justices*, [1899] 1 Q. B. 571, where,

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must, indeed, decide as to the collateral fact, in the first instance (*a*); but the superior court may upon *certiorari* inquire into the correctness of the decision, and may quash the proceedings in the lower court if such decision is erroneous, or at any rate if there is no evidence to support it (*b*). On the other hand, if the fact in question be not collateral, but a part of the very issue which the lower court has to inquire into, *certiorari* will not be granted, although the lower court may have arrived at an erroneous conclusion with regard to it (*c*).

Jurisdiction ousted.

**376.** In some cases the inferior court, having jurisdiction to enter upon an inquiry and having rightly entered upon it, becomes incapacitated to proceed because some fact appears which ousts its jurisdiction. Thus, it is an established principle of the common law that the jurisdiction of justices is ousted by a *bonâ fide* claim of title on the part of a defendant (*d*). If the claim of right put forward is of a character unknown to the law, it will not oust the jurisdiction of the justices although it is *bonâ fide* (*e*). But if it is known to the law, although only colourable, it will oust their jurisdiction (*f*). And even if the claim of right is not put forward at the first available opportunity the writ may still be granted (*g*). Whether a claim of right is put forward *bonâ fide*

Claim of right.

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on an application for a licence to sell intoxicating liquors to be granted only to the "real resident and occupier," the question as to what constitutes real residence and occupancy was held to be collateral (but see, as to this case, *R.* v. *Woodhouse*, [1906] 2 K. B. 501, C. A., and note (*c*), *infra*); *R.* v. *Bradford*, [1908] 1 K. B. 365, where, justices having power under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 53, 54, to license surveyors of highways to take materials for the repair of highways from the inclosed lands of any person, "such land not being a park," it was held that the question whether land was or was not a park was preliminary to the exercise of the jurisdiction given by the statute, and *certiorari* was granted to quash the decision of the magistrates on this point.

(*a*) *Pease* v. *Chaytor* (1863), 3 B. & S. 620, 641.

(*b*) *R.* v. *Bailey* (1854), 3 E. & B. 607; *R.* v. *Baker* (1857), 2 H. & N. 219; *Cornwell* v. *Sanders* (1862), 3 B. & S. 206; *Anon.* (1830), 1 B. & Ad. 382.

(*c*) *R.* v. *St. Olave's District Board* (1857), 8 E. & B. 529, where, on an award of compensation to the officers of certain commissioners, it was held that the question whether a particular person was such an officer, was not a collateral fact, but the very question to be decided; *Brittain* v. *Kinnaird* (1819), 4 Moore (C. P.), 50, where, in the case of a statutory offence relating to boats, the question whether a particular vessel was or was not a boat was held to be not collateral, but one of the facts involved in the issue before the magistrates. *In R.* v. *Woodhouse*, *supra*, where an application had been made for a licence which was only to be granted to a person "keeping, or about to keep," an alehouse, and for another licence which was only to be granted to the "real resident and occupier," it was held that whether the applicants came within those descriptions respectively was not a collateral fact and could not be inquired into on *certiorari*; reversed on other grounds (no opinion being expressed upon the point now in question) *sub nom. Leeds Corporation* v. *Ryder*, [1907] A. C. 420; and see *R.* v. *Bradley* (1894), 70 L. T. 379.

(*d*) *R.* v. *Pearson* (1870), L. R. 5 Q. B. 237; as to claim of right, see title MAGISTRATES.

(*e*) *Hudson* v. *MacRae* (1863), 4 B. & S. 585; *Hargreaves* v. *Diddams* (1875), L. R. 10 Q. B. 582; *Foulger* v. *Steadman* (1872), L. R. 8 Q. B. 65; *Watkins* v. *Major* (1875), L. R. 10 C. P. 662.

(*f*) *Cornwell* v. *Sanders* (1862), 3 B. & S. 206.

(*g*) *R.* v. *Taunton St. Mary* (*Inhabitants*) (1815), 3 M. & S. 465.

or not is a question for the lower court to decide in the first instance (*h*).

Where the jurisdiction of magistrates is expressly ousted by statute, in case the defendant has acted on "a fair and reasonable supposition" that he had a right, the common law restriction in favour of *bonâ fide* claims of right is superseded; and the magistrates may properly proceed with the case, even though the defendant's claim was *bonâ fide*, if they find that the claim was not based upon a fair and reasonable supposition (*i*).

Even although a claim of title is put forward *bonâ fide* by the defendant, if such claim is necessarily involved in the very question which the magistrates have to decide, their jurisdiction is not ousted and *certiorari* will not be granted (*k*).

Payment of rates.

Where the jurisdiction of magistrates to convict for the non-payment of a rate is expressly ousted by statute, in case the defendant should *bonâ fide* dispute this rate, the court below is restricted to determining the *bona fides* of the defendant. A mere statement on his part that he disputed the rate is not enough (*l*), but, on the other hand, the circumstance that an objection taken by the defendant is manifestly untenable in law is not enough to prove that the dispute is not *bonâ fide*, so as to give the magistrates jurisdiction to proceed with the case (*m*).

Although the court below must decide in the first instance whether its jurisdiction is ousted by a claim put forward by the defendant, this question, being collateral to the merits, may be inquired into on *certiorari* (*n*), and the decision of the magistrates may be quashed, at any rate, if there was no evidence proper to be considered by the magistrates in support of it (*o*).

(b) *Defect of Jurisdiction from Interest of Tribunal.*

Bias by interest.

**377.** It is an elementary principle that no man can be a judge in his own cause (*p*). Therefore, where persons who have a direct interest in the subject-matter of an inquiry before an inferior court take part in adjudicating upon it, the court is improperly constituted and is without jurisdiction, and *certiorari* will be granted to quash the determination arrived at.

Any pecuniary interest, however small, in the matter in dispute

(*h*) *Thompson* v. *Ingham* (1850), 14 Q. B. 710, 718; *R.* v. *Cridland* (1857), 7 E. & B. 853.

(*i*) *White* v. *Feast* (1872), L. R. 7 Q. B. 353; *R.* v. *Mussett* (1872), 26 L. T. 429.

(*k*) *R.* v. *Bradley* (1894), 70 L. T. 379, where the offence was under a Highway Act for the erection of a fence on a highway, and the defendant contended that the land on which the fence was erected was his land, and therefore that a question of title arose, and the court held that that was part of the very question for the justices to decide.

(*l*) *R.* v. *Wrottesley* (1830), 1 B. & Ad. 648.

(*m*) *R.* v. *Colling* (1852), 17 Q. B. 816.

(*n*) *Thompson* v. *Ingham* (1850), 14 Q. B. 710, 718; *Pease* v. *Chaytor* (1863), 3 B. & S. 620, 641; *R.* v. *Nunneley* (1858), E. B. & E. 852.

(*o*) *R.* v. *Stimpson* (1863), 4 B. & S. 301, *R.* v. *Nunneley, supra*; *Usher* v. *Luxmore* (1889), 62 L. T. 110; *Cornwell* v. *Sanders* (1862), 3 B. & S. 206; and see *Anon.* (1830), 1 B. & Ad. 383.

(*p*) *Dimes* v. *Grand Junction Co.* (1852), 3 H. L. Cas. 759.

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disqualifies a person from acting as judge (*q*), unless the disability is removed by statute (*r*).

Where the interest of the person adjudicating is not pecuniary, *certiorari* will not be granted unless it is shown that his interest is substantial and of such a character that it is likely to have biassed his decision (*s*), or that his decision was actually biassed (*t*). Interest as a trustee merely raises no presumption of bias (*a*). It is not enough to show that the person adjudicating holds strong views on the subject-matter of the offence in respect of

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(*q*) *R.* v. *Rand* (1866), L. R. 1 Q. B., 230, *per* BLACKBURN, J., at p. 231; *R.* v. *Farrant* (1887), 20 Q. B. D. 58, *per* STEPHEN, J., at p. 60; *R.* v. *Cheltenham Commissioners* (1841), 1 Q. B. 467, where, on an appeal against a rate, certain evidence being objected to by the respondents, the magistrates admitted it by eleven votes to eight, three of the majority being partners in a company to which certain premises belonged which were assessed to the rate in the name of the occupier, and *certiorari* was granted and the decision of the magistrates was quashed on the ground that the court was improperly constituted; *R.* v. *Aberdare Canal Co.* (1850), 14 Q. B. 854, where commissioners, whose consent to the erection of a bridge was required by a private Act of Parliament, had consented to its erection, after duly hearing evidence, and their decision was quashed on *certiorari* because some of the commissioners were shareholders in a railway company which would benefit through the access afforded by the bridge to the company's line from a neighbouring colliery; *R.* v. *Cambridge Recorder* (1857), 8 E. & B. 637, where an order made by the deputy recorder as to the costs of a rating appeal was quashed on *certiorari*, he being a ratepayer of one of the parishes affected by the order, although the order was really that of the recorder, and was only formally entered by the deputy; *Re Hopkins* (1858), E. B. & E. 100, where a conviction for travelling in a second-class carriage with a third-class ticket was quashed on *certiorari* on the ground that some of the magistrates who took part in the decision were shareholders in the railway company on behalf of which the information was preferred; *R.* v. *Hammond* (1863), 12 W. R. 208, where also it was held that magistrates who were shareholders in a railway company were disqualified from adjudicating in a case in which the prosecution was instituted by the railway company; *R.* v. *London and North Western Rail. Co.* (1863), 12 W. R. 208, where it was held that a sheriff who was a shareholder in a railway company was disqualified to summon a jury in pursuance of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 39, 145, to award compensation to that company for lands taken from them.

(*r*) As, for instance, Justices Jurisdiction Act, 1742 (16 Geo. 2, c. 18), s. 1; Justices of the Peace Act, 1867 (30 & 31 Vict. c. 115), s. 2 (see *R.* v. *Myers* (1875), 34 L. T. 247). Where by a statute it is declared that a member of the town council of a borough may act as a justice of the peace in matters arising under the statute, it does not disqualify him from so acting if it is shown that as a town councillor he has a pecuniary interest in the result of the information before the justices, or that the corporation of which he is a member are the prosecutors (*R.* v. *Handsley* (1881), 8 Q. B. D. 383, disapproving *R.* v. *Gibbon* (1880), 6 Q. B. D. 168, and distinguishing *R.* v. *Milledge* (1879), 4 Q. B. D. 332).

(*s*) *R.* v. *Rand*, *supra*, *per* BLACKBURN, J., at p. 231; *R.* v. *Farrant*, *supra*, *per* STEPHEN, J., at p. 61; *R.* v. *Meyer* (1875), 1 Q. B. D. 173, *per* BLACKBURN, J., at p. 177, where the chairman of a local board sat as a magistrate on the hearing of a case arising out of a dispute in which the board had actively participated, and it was held that he was an interested justice and *certiorari* was granted to quash the proceedings; *R.* v. *Huggins*, [1895] 1 Q. B. 563, where a qualified pilot was held incapable of sitting as a justice on the hearing of a charge for the offence of acting as pilot without any qualification.

(*t*) *R.* v. *Tempest* (1902), 86 L. T. 585, *per* Lord ALVERSTONE, C.J., at p. 587; *R.* v. *Milledge*, *supra*, explained in *R.* v. *Handsley*, *supra*.

(*a*) *R.* v. *Rand*, *supra*.

which he adjudicates (*b*), or that he is a subscriber to a society for the prevention of offences of the same character (*c*), or that he is a shareholder in a company carrying on business in a trade the general interests of which are affected by his decision (*d*).

The fact that a magistrate present on the bench has given evidence in another matter against the person charged before the court (*e*), or that in a case of assault he has in his private capacity as a surgeon attended the prosecutor (*f*), or recommended him to prosecute (*g*), does not in itself raise a presumption of interest or bias on his part.

An order for adjournment is not an adjudication, and *certiorari* will not be granted to quash such an order, although it was made by interested justices (*h*).

If a magistrate has a pecuniary or other substantial interest in the subject-matter of a cause at the hearing of which he is present on the bench, it is immaterial that he took no part in the proceedings (*i*). If a party to a cause before justices is aware that a magistrate is interested in the subject-matter of the cause, and nevertheless expressly or impliedly assents to his acting therein, such party cannot afterwards object (*k*).

(c) *Fraud.*

Fraud.

**378.** *Certiorari* may be granted to quash the determination of an inferior court on the ground of collusion (*l*), corruption (*m*), or, it would seem, any like fraud on the part of the prosecutor (*n*).

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(*b*) *Ex parte Wilder* (1902), 66 J. P. 761, where it was alleged that justices were strongly prejudiced against motor cars.

(*c*) *R.* v. *Deal* (*Mayor and Justices*), *Ex parte Curling* (1881), 45 L. T. 439, where persons who were subscribers to the Society for the Prevention of Cruelty to Animals had taken part in the conviction of the defendant for an offence on the prosecution of the society, but *certiorari* was refused; it was shown that subscribers had no authority over prosecutions which were directed from the central office in London, and that the society never accepted penalties.

(*d*) *R.* v. *Tempest* (1902), 86 L. T. 585, where, bias being alleged against one of the licensing justices on the ground that he held shares in a brewery and was therefore likely to favour the trade, *certiorari* was refused.

(*e*) *R.* v. *Alcock*, *Ex parte Chilton* (1878), 37 L. T. 829.

(*f*) *R.* v. *Farrant* (1887), 20 Q. B. D. 58.

(*g*) *Ibid.*

(*h*) *R.* v. *Uske* (*Inhabitants*) (1828), 2 Man. & Ry. (K. B.) 172.

(*i*) *R.* v. *Meyer* (1875), 1 Q. B. D. 173.

(*k*) *R.* v. *Cheltenham Commissioners* (1841), 1 Q. B. 467.

(*l*) *R.* v. *Gillyard* (1848), 12 Q. B. 527, where, it being provided by statute that the servant of a maltster should be punishable for a certain offence, and that his master might also be proceeded against for penalties unless he prosecuted his servant to conviction, a master, by collusion with his servant, prosecuted and obtained a conviction against him, for the purpose of relieving himself from penalties, and the conviction was quashed on *certiorari*; compare *R.* v. *Alleyne* (1854), 4 E. & B. 186.

(*m*) *R.* v. *Cambridge Justices* (1835), 4 Ad. & El. 111, *per* Lord DENMAN, C.J., at p. 121.

(*n*) *Ibid.*; *Colonial Bank of Australasia* v. *Willan* (1874), L. R. 5 P. C. 417. Compare *R.* v. *Unwin* (1839), 7 Dowl. 578, where, by a trick, the defendant secured that his case should be called on when the prosecution were unprepared with their witnesses, and that secured an acquittal. It would seem, however,

SECT. 7. Certiorari.

(d) *Error on the Face of the Proceedings.*

Error.

**379.** Where upon the face of the proceedings themselves it appears that the determination of the inferior court is wrong in law, *certiorari* to quash will be granted. Thus, *certiorari* to quash will be granted where the charge laid before the magistrates, as stated in the information, does not constitute an offence punishable by the magistrates (*o*), or where it does not amount in law to the offence of which the defendant is convicted (*p*), or where an order is made which is unauthorised by the finding of the magistrates (*q*).

Accident.

**380.** Merely formal or accidental errors on the face of the proceedings do not now afford ground for *certiorari*. Where there occurs any omission or mistake in drawing up an order or judgment of justices, and it is shown that there was evidence before them which would have authorised the drawing up of the order, free from such omission or mistake, the superior court may on *certiorari* amend the order or judgment and adjudicate thereupon as though no such omission or mistake had existed (*r*). If, however, the error complained of is one of substance (*a*), and not merely formal (*b*), it cannot be amended and must be quashed on *certiorari*.

Erroneous law.

**381.** Where the proceedings are regular upon their face and the magistrates had jurisdiction, the superior court will not grant the writ of *certiorari* on the ground that the court below has misconceived a point of law (*c*), nor will it hear evidence impeaching the

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that *certiorari* will never be granted for the purpose of quashing an acquittal; see *R.* v. *Galway Justices*, [1906] 2 I. R. 499.

(*o*) *R.* v. *Cridland* (1857), 7 E. & B. 853, where four defendants were ordered to be imprisoned for one month, until the costs and charges of conveying all four to gaol should be paid.

(*p*) *R.* v. *Bolton* (1841), 1 Q. B. 66, *per* Lord DENMAN, C.J., at p. 72.

(*q*) *R.* v. *Tomlinson* (1872), L. R. 8 Q. B. 12, where by a bastardy order dated April, 1871, the defendant was ordered to make payments as from August of the preceding year until the child was thirteen years of age; *R.* v. *Kay* (1873), L. R. 8 Q. B. 324, where a bastardy order was made in similar terms; *R.* v. *London Justices, Ex parte Saunders* (1895), 64 L. J. (M. C.) 273, where the defendant was convicted under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), for not abating a nuisance, and the magistrates imposed a fine, and imprisonment with hard labour in default of distress on non-payment of the fine, there being no power to inflict hard labour in such a case.

(*r*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 7. Justices cannot themselves amend errors, even of the character indicated, where the conviction has been filed with the clerk of the peace (*Ex parte Austin* (1880), 50 L. J. (M. C.) 8); but before filing, it seems that they may do so (*Ex parte Kenyon* (1881), 45 J. P. 303).

(*a*) *R.* v. *Bolton, supra*; *R.* v. *Cridland, supra*; *R.* v. *Tomlinson, supra*; *R.* v. *Kay, supra*.

(*b*) Formal defects were amended in *R.* v. *Higham* (1857), 7 E. & B. 557, where an order in bastardy described the mother as residing at M. within the county of ——, not mentioning that it was within the petty sessional division in which the justices had jurisdiction, though it was so in fact; in *R.* v. *Hellingley* (*Inhabitants*) (1859), 28 L. J. (M. C.) 167, where the justices had wrongly described themselves; and see *R.* v. *Lundie* (1861), 31 L. J. (M. C.) 157, where there was a conviction for breach of a bye-law, which bye-law was alleged to be bad in part, and the court allowed an amendment if necessary.

(*c*) *R.* v. *Christian* (1842), 12 L. J. (M. C.) 26.

decision on the facts (*d*). It is not now necessary for magistrates to set out the evidence in a conviction before them (*e*); but if they choose to do so, or if a court of quarter sessions elects to set out the evidence adduced before it in their order, and thus make it a "speaking order" (*f*), still the superior court will not on *certiorari* inquire whether the lower court has come to a right decision on the facts (*g*). But where the evidence is set out in the conviction or order (*h*), and the superior court are of opinion that there was no evidence proper to be considered by the magistrates in support of some point material to the conviction or order, *certiorari* will be granted (*i*). If there is any evidence, the court will not examine whether the right conclusion has been drawn from it (*k*).

Where *certiorari* is taken away by statute, even if it appears upon the face of the proceedings that there was no evidence whatever in support of the conviction, the writ will not be granted (*l*).

SUB-SECT. 5.—*Procedure.*

(i.) *Certiorari to remove for Trial in Civil Cases.*

**382.** The proceedings are governed by the Rules of the Supreme Court. Grant of writ.

In the case of local courts of record (*a*) to which the Borough and Local Courts of Record Act, 1872 (*b*), has not been applied, the writ is granted by fiat without formal application (*c*).

In the case of local courts of record to which the Borough and When leave required.

(*d*) *R.* v. *Bolton* (1841), 1 Q. B. 66; *R.* v. *Cambridge Justices* (1835), 4 Ad. & El. 111; *Tarry* v. *Newman* (1846), 15 M. & W. 645, *per* POLLOCK, C.B., at p. 653. But see *R.* v. *Bass* (1793), 5 Term Rep. 251.

(*e*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 17.

(*f*) *R.* v. *Galway Justices*, [1906] 2 I. R. 446; and see *Walsall Overseers* v. *London and North Western Rail. Co.* (1878), 4 App. Cas. 30.

(*g*) *R.* v. *Smith* (1800), 8 Term Rep. 588; *R.* v. *Bolton*, *supra*.

(*h*) The court can take notice of nothing which is not contained in the body of the conviction or order (*R.* v. *Yorkshire West Riding Justices* (1842), 12 L. J. (M. C.) 15; and see *R.* v. *Rotherham* (*Inhabitants*) (1842), 12 L. J. (M. C.) 17). And if the magistrates in their return to the writ of *certiorari* state any facts which are not contained in the order, the court cannot take cognisance of them (*R.* v. *Liston* (1793), 5 Term Rep. 338).

(*i*) *R.* v. *Smith*, *supra*.

(*k*) *Ibid.*

(*l*) *Re Shropshire Justices*, *Ex parte Blewitt* (1866), 14 L. T. 598, where the magistrate convicted on the faith of a charge by a police constable, without any hearing of the complaint, or plea of guilty, or witnesses called; *Ex parte Hopwood* (1850), 15 Q. B. 121, where the party was convicted, on a summons giving unreasonably short notice, in his absence, no one appearing on his behalf, except a solicitor, who was authorised only to apply for an adjournment, and there being no proof of service of the summons and no evidence adduced of the facts charged.

(*a*) For a list of the principal local courts of record, see title COURTS, Vol. IX., pp. 138 *et seq.*

(*b*) 35 & 36 Vict. c. 86.

(*c*) But if the action is for less than £20, security must be given by the defendant to satisfy the amount of the judgment, if it should be given against him, together with costs (Inferior Courts Act, 1779 (19 Geo. 3, c. 70), s. 6, as amended by Imprisonment for Debt Act, 1827 (7 & 8 Geo. 4, c. 71), s. 6; see p. 179, *ante*); and if the security be not given, *procedendo* may be awarded; see p. 202, *post*. As to actions of replevin in the county court, see p. 200, *post*.

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Local Courts of Record Act, 1872 (*d*), has been applied (*e*), the writ can only be issued by leave of a judge of the High Court (*f*); and in the case of county courts (unless the action to be removed is an action of replevin) the writ can only be issued by leave of the High Court or a judge thereof (*g*). In both these cases, however, if it is a common law action or matter which it is sought to remove, the application is made in the first instance to a master in chambers (*h*). It may be made *ex parte*, and the order may be made absolute at once (*i*), or the master, if he thinks fit, may direct that a summons shall be issued. In the case of an action of replevin in a county court the writ is granted by a master in chambers *ex parte* upon security being given for such amount not exceeding £150 as he may think fit. The security is conditioned to defend the action with effect and to prove before the High Court that the defendant had good ground for believing either that the title to some corporeal or incorporeal hereditament, the yearly value of which exceeded £20, or some toll, market, fair, or franchise was in question, or that the rent or damage in respect of which the distress was taken, or the value of the goods seized, exceeded £20 (*j*).

Where it is sought to remove an equity cause into the Chancery Division, the application is made on an originating summons or on motion (*k*). The order for the writ may be made *ex parte* (*l*).

Affidavit.

**383.** The application for the writ, whether made in the King's Bench Division or in the Chancery Division, is made on affidavit (*m*). This affidavit must disclose all material facts (*n*). The order for the writ to issue is made upon such terms as the master (or court or judge) may think fit to impose (*o*). Security is sometimes required to be given by the defendant for the payment of the amount of the

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(*d*) 35 & 36 Vict. c. 86.

(*e*) For a list of the courts to which the Act has been applied, see title COURTS, Vol. IX., p. 132, note (*b*).

(*f*) Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), Sched. XII.

(*g*) County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 124, 126.

(*h*) R. S. C., Ord. 54, r. 12. Where a statute directs that *certiorari* shall only be granted by leave of a judge of the High Court the application must be made at chambers, and cannot be made to the court (*Bowen* v. *Evans* (1848), 3 Exch. 111; *Robertson* v. *Womack* (1850), 19 L. J. (Q. B.) 367).

(*i*) *Symonds* v. *Dimsdale* (1848), 2 Exch. 533, where it was held that in order for a judge to ascertain whether a cause is fit to be tried in a superior court it is not necessary for him to hear both parties.

(*j*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 137; and see *Tummons* v. *Ogle* (1856), 6 E. & B. 571.

(*k*) *Re Royal Liver Friendly Society* (1887), 35 Ch. D. 332. Before the Judicature Act, 1873 (36 & 37 Vict. c. 66), the writ was obtained by a suit commenced by bill, called a *certiorari* bill (*Stephenson* v. *Houlditch* (1704), 2 Vern. 491; *Portington* v. *Tarbock* (1683), 1 Vern. 177).

(*l*) *Tracy* v. *Open Stock Exchange* (1870), L. R. 11 Eq. 556; *Jones* v. *Hey* (1869), 17 W. R. 996.

(*m*) The affidavit should not be intituled in any cause or matter (*Ex parte Nohro* (1823), 1 B. & C. 267).

(*n*) *Golding* v. *Caudwell* (1851), 2 L. M. & P. 175; *Parker* v. *Bristol and Exeter Rail. Co.* (1851), 2 L. M. & P. 136.

(*o*) Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), Sched. II.; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 126

claim and costs if the action should succeed (*p*); but the security required must be reasonable (*q*); and a defendant may be required, as a condition to the issue of the writ, to undertake to pay the entire costs in any event.

Appeals.

**384.** Where the application to remove a cause or matter is refused by a judge, no other judge can grant it (*r*). But if the application is made, as is usually the case, to a master, there is an appeal from his decision to a judge (*s*), and there is in this, as in other cases, an appeal from the judge to a divisional court (*a*). And in the case of a county court action, as in the case of other actions in inferior courts, a second application for the writ may be made to the same or another judge upon different grounds (*b*).

Service of writ.

**385.** The writ when obtained should be served on the judge or other officer of the court. Service on the officer of the registrar of a county court is sufficient (*c*); but if it be desired to attach the judge for disobedience to the writ personal service upon him is necessary (*d*).

In the case of local courts of record the writ must be served before joinder of issue or demurrer, provided that issue or demurrer is not joined until at least six weeks after the commencement of the action (*e*), or at latest before any juryman is sworn (*f*). In the case of county courts the writ may be served at any stage of the proceedings before final judgment (*g*).

Return.

**386.** The return to the writ is required to be made forthwith (*h*). The record itself must be returned, and not a mere copy (*i*). In county courts a fee may be charged for making the return (*k*).

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(*p*) In the case of causes removed from county courts, see, as to the security, County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 108, 109; and title COUNTY COURTS, Vol. VIII., pp. 600, 610.

(*q*) *Ex parte Great Western Rail. Co.* (1857), 2 H. & N. 557.

(*r*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 132.

(*s*) *Ibid.*

(*a*) *The Recepta*, [1893] P. 255, C. A.

(*b*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 132.

(*c*) *Brookman* v. *Wenham* (1851), 2 L. M. & P. 233.

(*d*) *Ibid.*

(*e*) Stat. (1623) 21 Jac. 1, c. 23, s. 2.

(*f*) Stat. (1601) 43 Eliz. c. 5. As to these statutes see p. 185, *ante*.

(*g*) *Re East Dulwich No.* 295 *Starr-Bowkett Building Society* (1890), 39 W. R. 32, where the case had been opened and witnesses called. In the case of county courts, if a copy of the order or summons is not served on the opposite party and on the registrar of the county court two clear days before the day fixed for trial, the judge of the county court may order the party who has obtained the writ to pay the costs of the day (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 129); and if the writ is granted *ex parte* the party obtaining it must lodge it with the registrar and give notice to the opposite party two clear days before the day fixed for the trial, or the judge of the county court may order him to pay the costs of the day (*ibid.*, s. 130).

(*h*) See form of writ, Crown Office Rules, 1906, Appendix, Forms Nos. 1, 7, 8.

(*i*) *Askew* v. *Hayton* (1832), 1 Dowl. 510; *Woodcraft* v. *Kinaston* (1742), 2 Atk. 317.

(*k*) *Batt* v. *Price* (1876), 1 Q. B. D. 264.

SECT. 7. Certiorari.

Attachment.

**387.** If the judge refuses to obey the writ he is liable to attachment for contempt of court, although his disobedience may have been due to the misconstruction of a statute (*l*). In order that he may be attached the writ must have been served upon him personally (*m*).

Quashing writ.

**388.** Whether the writ is granted *ex parte* or upon summons or motion to show cause, it may be quashed if it is shown that it has been issued through mistake (*n*), the non-disclosure of material facts (*o*), or otherwise (*p*).

Writ of *procedendo*.

**389.** If the writ is quashed (*q*), if the defendant does not comply with the conditions imposed upon him by the judge (*r*), if the writ is not delivered to the judge of the inferior court within the time limited by statute (*s*), or if after the removal of the cause the defendant does not prosecute it in the High Court (*t*), the writ of *procedendo* may be awarded; by this writ the cause is restored to the lower court to be dealt with, as though no proceedings in *certiorari* had taken place. Where the proceedings in the court below are not merely voidable, but void, so that *procedendo* could not be awarded to continue them there, *certiorari* will not be granted (*a*). When a cause has once been sent back by *procedendo* it will not again be removed by *certiorari* (*b*).

Applications to quash the writ of *certiorari* and for the writ of *procedendo* are made in the same manner as applications for the writ of *certiorari*.

Effect of removal.

**390.** Whatever stage the proceedings have reached in the lower court, upon removal they commence *de novo* (*c*). The defendant

(*l*) *Mungean* v. *Wheatley* (1851), 6 Exch. 88.

(*m*) *Brookman* v. *Wenham* (1851), 2 L. M. & P. 233.

(*n*) *Ruffman* v. *Thornwell* (1839), 7 Dowl. 613, where, the inferior court not being one of record, the defendant had mistakenly sued out *certiorari* instead of *recordari facias*, the writ was quashed on the defendant's application, no step having been taken by the plaintiff in the meanwhile; and the order to quash was made absolute in the first instance.

(*o*) *Parker* v. *Bristol and Exeter Rail. Co.* (1851), 2 L. M. & P. 136; compare *Golding* v. *Caudwell* (1851), 2 L. M. & P. 175.

(*p*) *E.g.*, where there is an admission that the writ was obtained for purposes of delay (*Landens* v. *Shiel* (1834), 3 Dowl. 90). Where *certiorari* was issued to remove a cause from an inferior court after judgment had been pronounced, and the plaintiff applied to quash the writ, the application was granted, although the plaintiff might have had *procedendo* without quashing it (*Ord* v. *Robinson* (1837), Will. Woll. & Dav. 593).

(*q*) *Parker* v. *Bristol and Exeter Rail. Co.* (1851), 2 L. M. & P. 136.

(*r*) *Lee* v. *Goodlad* (1824), 4 Dow. & Ry. (K. B.) 350; *Catton* v. *Faiers* (1837), Will. Woll. & Dav. 46.

(*s*) *Laverack* v. *Bean* (1837), 3 M. & W. 62.

(*t*) *Blanchard* v. *De la Crouée* (1847), 9 Q. B. 869; *Day* v. *Paupierre* (1849), 13 Q. B. 802.

(*a*) *Weston* v. *Sneyd* (1857), 1 H. & N. 703, where a justice of the peace who was sued in a county court for acts done in virtue of his office, gave notice of his objection to be sued in that court, by reason of which notice all future proceedings there became null and void (Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 10), and the justice then applied for *certiorari*, and it was held that *certiorari* could not be granted, inasmuch as *procedendo* could not in any case be awarded.

(*b*) *Hayward* v. *Wright* (1828), 8 B. & C. 386.

(*c*) *Davies* v. *Williams* (1879), 13 Ch. D. 550; *Turner* v. *Bean* (1739), Barnes, 345.

must enter an appearance in the High Court as soon as possible, and from this point the proceedings are governed by the Rules of the Supreme Court (*d*).

The plaintiff is not obliged to follow the action into the High Court (*e*), and if he declines to take any further step in the action after the defendant has appeared judgment cannot be signed against him (*f*).

If the plaintiff proceeds, his statement of claim must be for the same cause of action as he sued upon in the court below; but he may declare in a different form of action (*g*) and in a different capacity (*h*).

Trial.

**391.** A cause removed by *certiorari* from an inferior court of civil jurisdiction may be ordered to be tried at the sittings of the High Court in Middlesex or at the assizes (*i*), and either with or without a jury.

Costs.

**392.** Where the writ is granted to remove a cause from an inferior court of civil jurisdiction, the costs of the removal are costs in the cause (*k*).

Where an action is removed for trial from a county court, the rules as to costs which apply to actions brought in the High Court which might have been brought in the county court (*l*) are applicable to the costs of the removed action (*m*); but the fact that the defendant has succeeded in obtaining the removal of the cause affords a strong ground for allowing costs on the High Court scale (*n*).

(ii.) *Certiorari to remove Indictments for Trial.*

Removal of indictment for trial.

**393.** The proceedings are on the Crown side, and are governed by the Crown Office Rules (*o*). During the sittings the application

(*d*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 90; *Davies* v. *Williams* (1879), 13 Ch. D. 550.

(*e*) *Clack* v. *Dixon* (1814), 3 M. & S. 93; *Clerk* v. *Berwick Corporation* (1825), 4 B. & C. 649; *Norrish* v. *Richards* (1835), 5 Nev. & M. (K. B.) 268; *Garton* v. *Great Western Rail. Co.* (1858), E. B. & E. 83.

(*f*) According to the former practice the defendant could not obtain judgment of *non pros.* against the plaintiff for not proceeding (*Clack* v. *Dixon, supra; Clerk* v. *Berwick Corporation, supra; Garton* v. *Great Western Rail. Co., supra*); but the plaintiff was out of time if he did not declare within a year (*Norrish* v. *Richards, supra*). In a recent case (*Sterling* v. *Sims*, MS. note by Mr. Vizard, March 13th, 1903), a judge in chambers ordered an action which had been removed from an inferior court by *certiorari* to be dismissed because the plaintiff refused to take out a summons for directions, but still more recently one of the masters, with the approval of the same learned judge, did not follow this decision, but adhered to the old practice, and held there was no power to dismiss.

(*g*) *Gunn* v. *Mackhenry* (1750), 1 Wils. 277; *Bowerbank* v. *Walker* (1787), 2 Chit. 517.

(*h*) *Ashley* v. *Ashley* (1867), 17 L. T. 265, where in the court below the plaintiff declared as executor, but on the removal of the cause he declared *in propria persona;* and it was held that he was entitled to do so.

(*i*) *Bates* v. *Warner* (1889), 5 T. L. R. 582, C. A.; *Potter* v. *Great Western Colliery Co., Ltd.* (1894), 10 T. L. R. 380, C. A.

(*k*) R. S. C., Ord. 65, r. 3.

(*l*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116; R. S. C., Ord. 65, r. 12.

(*m*) *Pellas* v. *Breslauer* (1871), L. R. 6 Q. B. 438.

(*n*) *Ibid.*

(*o*) The word "indictment" includes coroners' inquisitions, and statutes and

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to remove an indictment for trial (unless made at the instance of the Attorney-General on behalf of the Crown) must be made to a divisional court of the King's Bench Division for an order *nisi* to show cause (*p*). In vacation, or when there is no sitting of a divisional court, it must be made to a judge in chambers for a summons to show cause (*q*). But where from special circumstances the court or a judge are of opinion that the writ should issue forthwith, the order may be made absolute, or an order may be made in the first instance, either *ex parte* or otherwise, as the court or judge may direct (*r*). A summons to show cause before a judge in chambers cannot be granted without the leave of a judge upon an *ex parte* application (*s*).

Affidavit.

**394.** The application is made on affidavit (*t*), and, except when the indictment is against a body corporate not authorised to appear by solicitor in the court below, the party applying (other than the Attorney-General acting on behalf of the Crown) must show that the statutory conditions are present (*a*).

Recognisance.

**395.** Where the writ for the removal of an indictment into the High Court for trial has been granted at the instance of the defendant (*b*), such defendant (*c*) must enter into a recognisance (*d*) in such sum and with such sureties as the court or judge granting the writ may order (*e*), conditioned—(1) to appear

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authorities referring to the former relate also to the latter (*R.* v. *Ingham* (1864), 5 B. & S. 257). The Crown Office Rules, 1906, rr. 12—19, appear also to apply to presentments of commissioners of sewers; see *R.* v. *Baker* (1859), 28 L. J. (Q. B.) 377.

(*p*) Crown Office Rules, 1906, r. 12.

(*q*) *Ibid.*

(*r*) *Ibid.*

(*s*) *Ibid.*, r. 266 (b).

(*t*) *Ibid.*, r. 234. The affidavit must be intituled "In the High Court of Justice, King's Bench Division" (*ibid.*, r. 6). It must not be intituled in a cause (*R.* v. *Walworth* (1846), 10 Jur. 967; *Ex parte Nohro* (1823), 1 B. & C. 267).

(*a*) Crown Office Rules, 1906, r. 13. As to these grounds of application, see p. 181, *ante*.

(*b*) *Ibid.*, r. 14.

(*c*) If there are two or more defendants, it is only a defendant at whose instance the indictment is removed who is required to enter into recognisances (*ibid.*; and see *R.* v. *Newton* (1837), 2 Nev. & P. (K. B.) 121); but such defendant may be required to enter into recognisances to pay costs, not only if he be convicted, but also if the other defendants or any other defendant be convicted (*R.* v. *Jewell* (1857), 7 E. & B. 140; and see *R.* v. *Brinsmead* (1898), 62 J. P. 56). Where unincorporated bodies of persons (such as the inhabitants of a parish) are required to enter into recognisances, such recognisances are entered into by one or more members of the body on behalf of all (*R.* v. *Abergele* (*Inhabitants*) (1836), 5 Ad. & El. 795). The same practice exists with regard to incorporated bodies (*R.* v. *Manchester Corporation* (1857), 7 E. & B. 453, *per* COLERIDGE, J., at p. 459). In the case of incorporated companies recognisances are usually entered into by a director on behalf of the company, but any member may be authorised to enter into them (*Southern Counties Deposit Bank* v. *Boaler* (1895), 73 L. T. 155).

(*d*) The recognisances are to be entered into before a judge of the High Court, or before the court before which the defendant stands indicted, or before one or more justices of the peace of the county or place in which the indictment was found or in which the defendant resides (Crown Office Rules, 1906, r. 14).

(*e*) The order as to the recognisances is to be indorsed on the writ (*ibid.*).

and plead to the indictment (*f*); (2) to give notice of trial; (3) to proceed to trial at the next assizes to be held in the county in which the indictment was found, or if it was found in London or Middlesex, forthwith at the sittings of the High Court of Justice; (4) personally to appear from day to day at the trial of such indictment, and if necessary in the King's Bench Division of the High Court of Justice, and not depart till he has been discharged by the court; and (5) to pay the costs of the prosecution subsequent to the removal of the indictment if he be convicted.

Where the writ has been granted at the instance of the prosecutor (other than the Attorney-General acting on behalf of the Crown or the prosecutor of an indictment against a body corporate), the prosecutor must (*g*) enter into a recognisance in the same manner and to the same amount as is provided in the case of a defendant, and conditioned—(1) on the return of the writ to make up the record; (2) to give notice of trial (as provided in the case of a defendant); and (3) to pay the costs of the defendant subsequent to the removal of the indictment if the defendant be acquitted.

If the person at whose instance the writ has been obtained does not enter into a recognisance in accordance with the order of the court or judge, the court to which the writ is directed must not allow it (*h*), but must proceed with the trial of the indictment as though such writ had not been awarded (*i*).

The recognisance when entered into must be transmitted to the Crown Office and filed there (*k*).

Return and appearance.

**396.** In obedience to the writ the return must be made forthwith; the record itself must be returned (*l*). Upon the return to the writ the defendant must appear. In cases of misdemeanour he must enter an appearance in the Crown Office (*m*). In cases of felony, unless a judge's order is obtained permitting the defendant to appear by solicitor in the Crown Office, he must appear in person, in open court, in the King's Bench Division (*n*).

Pleading.

**397.** After appearance the defendant may plead to the indictment. In cases of misdemeanour he may plead in the Crown Office (*o*); in cases of felony, unless a judge's order is obtained

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(*f*) In the case of felony the recognisances are conditioned to appear and plead in open court (*ibid.*); but the defendant may obtain a judge's order for liberty to appear and plead by a solicitor in the Crown Office (*ibid.*, r. 121).

(*g*) Crown Office Rules, 1906, r. 15; see as to a corporation, *R.* v. *Manchester Corporation* (1857), 7 E. & B. 453, 459.

(*h*) Crown Office Rules, 1906, rr. 14, 15.

(*i*) *Ibid.*, r. 16; and see *R.* v. *East Stoke* (*Inhabitants*) (1865), 34 L. J. (M. C.) 190.

(*k*) Crown Office Rules, 1906, r. 112.

(*l*) *Askew* v. *Hayter* (1832), 1 Dowl. 510; *Woodcraft* v. *Kinaston* (1742), 2 Atk. 317.

(*m*) Crown Office Rules, 1906, r. 72.

(*n*) *Ibid.*

(*o*) *Ibid.*, r. 127. Pleadings are delivered to the opposite party and filed in the Crown Office (*ibid.*).

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permitting the defendant to plead by solicitor in the Crown Office, he must plead in person, in open court, in the King's Bench Division (*p*).

Default.

**398.** If the indictment has been removed at the instance of the defendant, the prosecutor may draw up an order at the Crown Office, to be served on the defendant or his solicitor, calling on the defendant to appear, plead, and try according to the conditions of his recognisance (*q*). If the defendant after being served with such order fails to obey it, application may be made to the court to estreat the recognisances and for a writ of *procedendo;* or, if *procedendo* be not applied for, a judge, upon certificate of the Crown Office of the defendant's default, may issue a warrant to arrest him and cause him to be brought before such judge, or some other judge, or before a justice of the peace, to be dealt with according to law (*r*).

If the indictment has been removed into the King's Bench Division at the instance of the prosecutor, a judge may, upon certificate of the Crown Office of the defendant's default to appear or plead, issue a like warrant for the arrest of the defendant; or the prosecutor may issue a writ of *venire facias* (*s*).

In the case of the removal of an indictment at the instance of one of several defendants, if any defendant other than that one fails to appear and plead, the prosecutor may obtain a certificate of default, and apply to a judge for a warrant for the arrest of the defendant so in default, or he may issue a writ of *venire facias* (*t*).

Notice of trial.

**399.** The prosecutor may in all cases give notice of trial. When the defendant is under recognisance to do so the prosecutor may give notice by proviso (*a*). If the prosecutor does not give notice of trial within six weeks after issue joined the defendant may do so (*b*).

Trial.

**400.** After the removal of an indictment into the High Court application may be made for a trial at bar (*c*), or at the Central Criminal Court (*d*), or in some county other than that in which the indictment was found (*e*).

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(*p*) Crown Office Rules, 1906, r. 121.
(*q*) *Ibid.*, r. 73. The order is of course, without motion (*ibid.*, r. 233).
(*r*) *Ibid.*, rr. 74, 76.
(*s*) *Ibid.*, r. 83.
(*t*) *Ibid.* As to subsequent proceedings, see *ibid.*, rr. 84—87.
(*a*) *Ibid.*, r. 138.
(*b*) *Ibid.* See further as to giving notice of trial and entering the record for trial, *ibid.*, rr. 137—146.
(*c*) Application for a trial at bar must be made by motion for an order *nisi*, except when made by the Attorney-General on behalf of the Crown, when it is granted as of course (*ibid.*, rr. 150, 151).
(*d*) Application for a trial at the Central Criminal Court must, during the sittings, be made by motion for an order *nisi*, and in vacation, or when no divisional court is sitting, to a judge in chambers (*ibid.*, r. 19).
(*e*) Application for a change of venue is made in the same manner as mentioned in the last note; see p. 182, *ante*.

(iii.) *Certiorari to Quash.*



**401.** The proceedings are on the Crown side, and are governed by the Crown Office Rules (*f*).

Application for writ.

During the sittings an application for the writ of *certiorari* for the purpose of quashing any proceedings must be made to a divisional court by motion for an order *nisi*, and in vacation, or when there is no sitting of a divisional court, to a judge at chambers for a summons to show cause (*g*). This rule does not apply to the Attorney-General acting on behalf of the Crown (*h*).

Where a case has been stated at sessions, an order for *certiorari* may by consent in writing be drawn up at the Crown Office, without motion or summons as of course (*i*).

When the validity of any order, conviction, or inquisition or record is questioned, and application for the writ of *certiorari* is made to remove it, a copy of the order, conviction, inquisition, or record, verified by affidavit, must be produced and handed to the officer of the court before the motion is made, or its absence must be accounted for to the satisfaction of the court; otherwise the writ will not be issued (*k*).

Affidavit.

**402.** Except when the motion is made by the Attorney-General acting on behalf of the Crown, it must be supported by affidavit (*l*).

Affidavits are admissible to show fraud or defect of jurisdiction, but not to show error (*m*) or to add to the evidence in the court below (*n*). Where error on the face of the proceedings is

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(*f*) Crown Office Rules, 1906, rr. 20—24, 27, regulate the procedure on applications to quash orders and convictions of magistrates. These rules apply also, so far as they are applicable, to the removal of all other proceedings which are subject to removal by *certiorari* for the purpose of being quashed (*ibid.*, r. 30). Where *certiorari* is the creature of statute (see p. 173, *ante*), or in any case in which special conditions have been imposed by statute with regard to notice, recognisances or otherwise, it is conceived that these conditions must still be complied with. Applications for *certiorari* to remove articles of the peace originally exhibited at the assizes or sessions of the peace in order to quash them are specially regulated by the Crown Office Rules, 1906, rr. 255, 256. The mode of application is that prescribed by *ibid.*, r. 20; but it would seem that *ibid.*, r. 21, does not apply to these applications, and the recognisances required by *ibid.*, r. 24, never become necessary with regard to them, since by *ibid.*, r. 256, the court will, on the argument of the order, either quash the articles or commit the defendant to prison until he find the bail required by the articles.

(*g*) Crown Office Rules, 1906, r. 20.

(*h*) *Ibid.*

(*i*) *Ibid.*, r. 233 (m). *Certiorari* is not, however, necessary to bring up a case stated at sessions or by justices (see p. 166, *ante*). Where a case has been stated at quarter sessions, the clerk of the peace is required, upon application by the appellant, to transmit the record to the Crown Office without any order for that purpose (*ibid.*, r. 31).

(*k*) Crown Office Rules, 1906, r. 22.

(*l*) *Ibid.*, r. 234. Where it is not necessary to state matters of fact, affidavits need not be used (*ibid.*). In *certiorari* affidavits are always necessary, either to verify a copy of the record or to show fraud or defect of jurisdiction. Affidavits must be intituled "In the High Court of Justice, King's Bench Division" (*ibid.*, r. 6) and must not be intituled in a cause.

(*m*) *R.* v. *Bolton* (1841), 1 Q. B. 66; *Re Penny and South Eastern Rail. Co.* (1857), 7 E. & B. 660.

(*n*) *R.* v. *Cork County Justices* (1882), 15 Cox, C. C. 78.

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alleged, and a copy of the order or determination complained of cannot be obtained and verified by affidavit (*o*), the applicant must make an affidavit of the alleged defects according to the best of his information and belief (*p*). Where defect of jurisdiction through interest of parties is alleged, the party applying ought to show in his affidavit that at the time of the hearing he was unaware of the interest (*q*).

Limitation.

**403.** The writ cannot be granted unless it is applied for within six calendar months of the making of the order or determination complained of (*r*). In the case of convictions and orders of justices from which an appeal lies to the sessions the writ cannot be granted until either the matter has been determined on appeal or the time for appealing has expired (*s*).

Service of order *nisi*.

**404.** The writ cannot be granted unless it is proved by affidavit (*t*) that the party applying for it has served the order *nisi* or the summons (*a*) six days (*b*) before the return day on the justices or other persons by and before whom the determination was made which it is desired to quash.

In the case of justices, if the determination which it is desired to

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(*o*) See Crown Office Rules, 1906, r. 22.

(*p*) *R.* v. *Manchester and Leeds Rail. Co.* (1838), 8 Ad. & El. 413.

(*q*) *R.* v. *Kent Justices* (1880), 44 J. P. 298.

(*r*) Crown Office Rules, 1906, r. 21. This period of six months was formerly fixed by statute (13 Geo. 2, c. 18, s. 5); but it applied only to orders of magistrates, and there was no general rule of practice requiring the application to be made within six months (*R.* v. *Sheffield Corporation* (1871), L. R. 6 Q. B. 652). But now the rule applies to all applications for *certiorari* to quash (Crown Office Rules, 1906, r. 30). Where an order is made subject to a case stated, the period of six months runs from the date of the order, and not from the date when the case is settled (*R.* v. *Sussex Justices* (1813), 1 M. & S. 631; *Elliot* v. *Thompson* (1875), 33 L. T. 339; see also *R.* v. *Tower Hamlets Commissioners of Sewers* (1843), 7 Jur. 1169; *R.* v. *Anglesea Justices* (1846), 10 Jur. 817). When the period of six months was fixed by statute the court had no power to extend it. Now that it is fixed by a rule of court the court has power to extend it. R. S. C., Ord. 64 (time), applies to all proceedings on the Crown side (Crown Office Rules, 1906, r. 259); and R. S. C., Ord. 64, r. 7, gives power to a court or a judge to enlarge or abridge the time fixed by a rule, even when it is also fixed by pre-existing statutes; see *Re Oliver and Scott's Arbitration* (1889), 43 Ch. D. 310.

(*s*) Crown Office Rules, 1906, r. 29. This rule only applies to orders and convictions of magistrates. Where an appeal takes place, the period of six months runs from the date of the adjudication at sessions, and not from that of the original order of justices (*R.* v. *Middlesex Justices* (1836), 5 Ad. & El. 626).

(*t*) Crown Office Rules, 1906, r. 21.

(*a*) The service of the order *nisi*, or of the summons to show cause, corresponds to and is in substitution for the notice formerly required.

(*b*) In the case of orders of the Local Government Board (Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 106) ten days' notice is required, together with a statement of the grounds upon which the application is made. These grounds may now be stated in the order *nisi* or summons to show cause. In the case of applications to quash the decisions of the Board of Agriculture and Fisheries (exercising the jurisdiction formerly vested in tithe commissioners) respecting parish boundaries (Tithe Act, 1837 (7 Will. 4 & 1 Vict. c. 69), s. 3) eight days' notice is required, together with a statement of the grounds upon which the application is made. These grounds may now be stated in the order *nisi* or summons to show cause.

quash was made by or before more than one justice, service on any two is sufficient (*c*).

Order absolute.

**405.** A motion to quash the determination complained of is frequently made at the same time as a motion for the writ of *certiorari;* but when this is not the case the divisional court may nevertheless, if it thinks fit, make it a part of the order absolute for the *certiorari* that the determination complained of shall be quashed on return without further order (*d*). The court cannot, however, adopt this course where the application is made in order to bring up a special case stated by justices (*e*). In the case of an application to remove articles of the peace, originally exhibited at the assizes or sessions of the peace, in order to quash them, the court will, upon the argument of the order *nisi*, either quash the articles and discharge the defendant and his recognisance, or convict him to prison until he find the required bail, as though the articles had been originally exhibited in the King's Bench Division (*f*).

Payment into court or recognisance.

**406.** Where the court upon the argument of the order *nisi* merely makes the order absolute that the writ of *certiorari* shall issue, the party prosecuting the *certiorari* (*g*), other than the Attorney-General (*h*) or any prosecutor *pro rege* (*i*), must either pay £50 into court or must enter into a recognisance (*k*) with sufficient sureties in the sum of £50 (*l*), conditioned—(1) to prosecute the *certiorari* at his own costs and charges; and (2) to pay the party in whose favour the determination in the court below was made, within one month (*m*) after such determination is

(*c*) Service on justices who are alleged by affidavit to have been present at the sessions, and to have been two of the justices by and before whom the order of sessions was made, is good without showing that they took part in the decision of the case (*R.* v. *Suffolk Justices* (1852), 18 Q. B. 416; *R.* v. *Cornwall Justices* (1845), 9 Jur. 110; *R.* v. *Cartworth* (*Inhabitants*) (1843), 5 Q. B. 201; compare *R.* v. *Sevenoaks* (*Inhabitants*) (1845), 7 Q. B. 136; *R.* v. *Gilberdike* (*Inhabitants*) (1843), 5 Q. B. 207). An affidavit that the justices served were present at sessions on the day when the order was made is not sufficient (*R.* v. *St. James's, Colchester* (*Inhabitants*) (1851), 15 Jur. 467). It must be shown that they were present on the bench when the case was heard (*R.* v. *Darton* (*Inhabitants*) (1844), 14 L. J. (M. C.) 41).

(*d*) Crown Office Rules, r. 23.

(*e*) *Ibid.*

(*f*) *Ibid.*, r. 256.

(*g*) *Ibid.*, r. 24. When a parish prosecutes a *certiorari* the recognisance must be entered into by some one inhabitant on behalf of the rest of the parish with two sureties (*R.* v. *Abergele* (*Inhabitants*) (1836), 1 Nev. & P. (K. B.) 235).

(*h*) Crown Office Rules, 1906, r. 24.

(*i*) *Ex parte Spencer* (1839), 1 Per. & Dav. 358, where the decision was upon the terms of the Quarter Sessions Appeal Act, 1731 (5 Geo. 2, c. 19), s. 2, which required "the party or parties prosecuting such *certiorari*" to enter into a recognisance.

(*k*) The recognisance must be entered into before one or more justices of the county or place, or at their general or quarter sessions, where the judgment or order has been given or made, or before any judge of the High Court (Crown Office Rules, 1906, r. 24).

(*l*) The rule is not complied with if the sureties are for £25 each; they must be for £50 each (*R.* v. *Dunn* (1799), 8 Term Rep. 217).

(*m*) In the case of *certiorari* to remove orders of the Local Government Board, the period is ten days after the decision of the High Court confirming the order (Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 106).

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confirmed (*n*), his costs and charges (*o*). The parties may, however, by consent in writing dispense with any payment into court or recognisance (*p*). If, in the absence of any such dispensation, the party prosecuting the *certiorari* does not pay the required amount into court or enter into the required recognisance, or if he does not perform the conditions of the recognisance, the court below must not allow the writ, and such court may proceed and make such further order for the benefit of the party in whose favour its determination has been made as though no *certiorari* had been granted (*q*).

The recognisance when entered into must be transmitted to the Crown Office and filed there (*r*).

Application to supersede.

**407.** When the rule *nisi* for *certiorari* has been made absolute, and before it is returned, application may be made for a rule *nisi* to supersede it (*s*) on the ground that it was issued *improvide*, or that it is defective in some material point.

Return.

**408.** The record must, in accordance with the terms of the writ, be returned forthwith. It need not be under seal (*t*), nor is it required to be authenticated in any particular form (*a*). The record itself must be returned (*b*). If a copy only is returned, a rule may be obtained to quash the writ and the return and to award *procedendo* (*c*). After a conviction has been filed with the clerk of the peace it cannot be amended, and must be returned in the form in which it is filed (*d*); but before filing it seems that the justices may amend the record (*e*). When the return has been

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(*n*) An order removed by *certiorari* is confirmed by simply discharging the rule for quashing it (*R.* v. *Latchford* (*Inhabitants*) (1844), 6 Q. B. 517).

(*o*) In criminal causes the condition is to pay the costs and charges to be taxed according to the course of the court (Crown Office Rules, 1906, r. 24); in civil causes and matters it is to pay such costs, if any, as the court shall allow (*ibid.*, r. 27); in the case of *certiorari* to remove orders of the Local Government Board it is to pay the taxed costs (Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 106); and in the case of *certiorari* to remove the decision of the Board of Agriculture and Fisheries (exercising the jurisdiction formerly vested in tithe commissioners) respecting parish boundaries, it is also to pay taxed costs (Tithe Act, 1837 (7 Will. 4 & 1 Vict. c. 69), s. 3).

(*p*) Crown Office Rules, 1906, r. 24.

(*q*) *Ibid.* If the recognisances have been entered into after the allowance of the writ in the court below, application may be made to quash the allowance (*R.* v. *Jones* (1841), 9 Dowl. 504). Where an allowance of the writ has been quashed for a defect in the recognisances, the court may send the writ down again to be properly allowed (*R.* v. *Abergele* (*Inhabitants*) (1836), 5 Ad. & El. 795).

(*r*) Crown Office Rules, 1906, r. 112.

(*s*) Before the return to the writ, the application should properly be for a *supersedeas;* after the return the application should be to quash the writ or the return (*Woodcraft* v. *Kinaston* (1742), 2 Atk. 317, 318, 319). Upon such application the affidavits should not be intituled in any cause (*R.* v. *Chasemore* (1848), 12 Jur. 11).

(*t*) *R.* v. *Pickersgill* (1783), Cald. Mag. Cas. 297; but see *R.* v. *Kenyon* (1827), 6 B. & C. 640.

(*a*) *Atkinson* v. *R.* (1785), 3 Bro. Parl. Cas. 517.

(*b*) *Askew* v. *Hayton* (1832), 1 Dowl. 510; *Woodcraft* v. *Kinaston, supra.*

(*c*) *Askew* v. *Hayton, supra; Palmer* v. *Forsyth* (1825), 4 B. &.C. 401. As to *procedendo*, see p. 202, *ante*.

(*d*) *Ex parte Austin* (1880), 50 L. J. (M. C.) 8; and see *R.* v. *Barker* (1800), 1 East, 186.

(*e*) *Ex parte Kenyon* (1881), 45 J. P. 303.

filed, application may be made (*f*) for a rule *nisi* to quash the writ and take the return off the file on the ground that the writ was issued *improvide* (*g*), or that it is defective in some material point (*h*). After the writ has been obeyed and a return made to it, it is, however, too late to complain of misdescription in (*i*), or misdirection of (*k*), the writ.

Motion to quash.

**409.** Unless the writ of *certiorari* is quashed and taken off the file, the party prosecuting it must move the court, in pursuance of his recognisance, to quash the proceedings returned (*l*). Upon this motion no objection on account of any omission or mistake in the determination of the court below can be taken, unless it has been specified in the order for issuing the *certiorari* (*m*); it is too late at this stage to take exception to the form of the writ of *certiorari* (*n*).

Costs.

**410.** The High Court has jurisdiction to award costs in *certiorari* in cases on the Crown side (*o*).

(iv.) *Certiorari for the Execution of Judgments of Civil Courts.*

Application.

**411.** The proceedings are on the civil side, and are governed by the Rules of the Supreme Court.

The application is made *ex parte* to a master in chambers in the King's Bench Division and by originating summons in chambers, or by motion in the Chancery Division (*p*). It must be supported

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(*f*) The application should be made promptly (*R.* v. *Basingstoke* (*Inhabitants*) (1849), 6 Dow. & L. 303). Notice should be given to the justices who made the order as well as to the parties supporting it (*Re Blandford Roads*, *R.* v. *Spackman* (1841), 9 Dowl. 1060). Affidavits should not be intituled in a cause (*R.* v. *Gilberdyke* (*Inhabitants*) (1843), 8 Jur. 79; but see *R.* v. *Jones* (1839), 8 Dowl. 80).

(*g*) *R.* v. *Wakefield* (1758), 1 Burr. 485.

(*h*) *R.* v. *Wigan Justices* (1844), 8 Jur. 930.

(*i*) *R.* v. *Turk* (1847), 10 Q. B. 540.

(*k*) *Daniel* v. *Philips* (1792), 4 Term Rep. 499.

(*l*) Where *certiorari* was granted on the application of the defendants, and one of them died after the return, the motion to quash was nevertheless heard (*R.* v. *Yorkshire North Riding Justices* (1827), 9 Dow. & Ry. (K. B.) 204).

(*m*) Crown Office Rules, 1906, r. 28.

(*n*) *R.* v. *Fordham* (*Inhabitants*) (1839), 11 Ad. & El. 73.

(*o*) *R.* v. *Woodhouse*, [1906] 2 K. B. 501, C. A. Formerly the superior court had no power to award costs in *certiorari* on the Crown side. Costs could only be recovered when the party presenting the *certiorari* was bound by recognisance to pay costs in case the decision was adverse to him. In *R.* v. *Woodhouse*, *supra*, however, the Court of Appeal held that, inasmuch as before the Judicature Act, 1873 (36 & 37 Vict. c. 66), the Court of Chancery had power to award costs in *certiorari*, the High Court now possesses that power in all cases.

(*p*) Before the Judicature Act, 1873 (35 & 36 Vict. c. 66), judges of the superior courts of common law alone had power to grant *certiorari* for execution. This power is now shared by all judges of the High Court. In practice, however, it is generally only where the judgment of the inferior court is in an equity proceeding that application is made for execution in the Chancery Division. The Inferior Courts Act, 1779 (19 Geo. 3, c. 70), s. 4, applies only to judgments in common law actions. But the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 22, applies also to judgments in equitable proceedings of such local courts of record as have equitable jurisdiction (*Harvey* v. *Gilbard* (1839), 7 Dowl. 616).

SECT. 7. Certiorari.

by affidavit (*q*), and a copy of the judgment order or rule upon which execution is desired must be produced.

Affidavit.

**412.** Where it is sought to remove a judgment under the Inferior Courts Act, 1779 (*r*), the affidavit must show that execution has been issued in the court below, that diligent search has been made for effects of the defendant within the jurisdiction of the court below, and that no such effects have been found.

Where it is sought to remove a judgment under the Judgments Act, 1838 (*s*), the affidavit must show that the court is one in which in the year 1837 a barrister of not less than seven years' standing was acting as judge or assessor or assistant.

And so, where it is sought to remove a judgment under the special Act of a local court of record (*a*), such facts must be shown as are necessary to bring the application within the terms of the Act in question.

Where it is sought to remove a judgment of a county court, it must be shown that there are no goods or chattels of the judgment debtor which can be conveniently taken to satisfy such judgment (*b*).

Upon affidavit of the necessary facts and upon production of a copy of the judgment of the inferior court duly verified, the application is granted as of course, and the rule is usually made absolute in the first instance (*c*), although the application is *ex parte*. Costs of the removal may be granted.

Return.

**413.** The original judgment must be returned in obedience to the writ (*d*); but where an original judgment has been destroyed by a fire, a verified copy may be admitted as a compliance with the writ (*e*).

Execution.

**414.** After the return has been made the judgment creditor may issue execution in the High Court for the amount of his judgment, together with the costs of the removal if they have been granted.

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(*q*) The affidavit should be intituled "In the matter of" the Act under which application is made, and in the matter of the judgment or order in the inferior court.

(*r*) 19 Geo. 3, c. 70, s. 4.

(*s*) 1 & 2 Vict. c. 110, s. 22.

(*a*) As, for instance, Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), s. 88. The application in this case is for an order in the nature of *certiorari*. A judgment of the Mayor's Court, London, may be enforced in the High Court upon simple transmission without writ and without order (Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 48). Execution on a judgment of the Liverpool Court of passage may be obtained in the High Court by order of the master without writ of *certiorari;* but this is limited to execution by *fi. fa.* (Liverpool Court of Passage Act, 1838 (1 & 2 Vict. c. xcix.), s. 3). See also title EXECUTION.

(*b*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 151.

(*c*) *Knowles* v. *Lynch* (1834), 2 Dowl. 623; *Pawsey* v. *Gooday* (1835), 3 Dowl. 605.

(*d*) In *Kemp* v. *Parry* (1844), 8 Jur. 576, it was suggested that an exemplification of the judgment under the seal of the inferior court would suffice; but the invariable practice appears to be to require the original.

(*e*) *Cheesewright* v. *Franks* (1838), 6 Dowl. 471.

(v.) *In other Cases.*

SECT. 7. Certiorari.

Miscellaneous applications.

**415.** Where *certiorari* is desired for the purpose of removing an indictment and the proceedings thereon for judgment (*f*), or for sentence (*g*), or for outlawry (*h*), or for the purpose of removing recognisances upon articles of the peace in order to quash them (*i*), or to estreat them (*k*), or for the purpose of removing a special case (*l*), or for the purpose of removing the record of an inferior court of criminal jurisdiction for use in evidence (*m*), the application is on the Crown side and must be by motion to the King's Bench Division, unless leave is obtained, on an *ex parte* application to a judge in chambers, to issue a summons to show cause before a judge in chambers (*n*).

Where it is desired to remove recognisances upon articles of the peace in order that attachment may issue upon them (*o*), or where a case has been stated at sessions and the parties consent in writing to the issue of *certiorari* (*p*), an order for the writ may be obtained on application at the Crown Office without motion or summons.

Highway appeals.

**416.** Where an appeal (*q*) is brought against a conviction on an indictment for the non-repair of, or obstruction to, a highway, public bridge, or navigable river, *certiorari* to remove such conviction may be issued to the appellant, as of course, upon application at the Crown Office without any order or recognisance (*r*).

Removal as evidence.

**417.** Where *certiorari* is required in order to remove the record of an inferior court of civil jurisdiction for the purpose of evidence (*s*), it is conceived that the application should be made on the civil side to a master in chambers.

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(*f*) See p. 159, *ante*.
(*g*) See p. 164, *ante*.
(*h*) *Ibid.*
(*i*) *Ibid.*
(*k*) *Ibid.*
(*l*) See p. 165, *ante*.
(*m*) See p. 166, *ante*.
(*n*) Crown Office Rules, 1906, r. 266.
(*o*) *Ibid.*, r. 254.
(*p*) *Ibid.*, r. 233 (m).
(*q*) Under the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 20.
(*r*) Crown Office Rules, 1906, r. 17A.
(*s*) See p. 166, *ante*.

# CROWN RIGHTS.

*See* CONSTITUTIONAL LAW.

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# CRUELTY.

*See* HUSBAND AND WIFE.

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# CRUELTY TO ANIMALS.

*See* ANIMALS.

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# CRUELTY TO CHILDREN.

*See* CRIMINAL LAW AND PROCEDURE; INFANTS AND CHILDREN.

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# CUL DE SAC.

*See* HIGHWAYS, STREETS AND BRIDGES.

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# CUMULATIVE GIFTS.

*See* WILLS.

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# CURATE.

*See* ECCLESIASTICAL LAW.

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# CURATOR.

*See* INFANTS AND CHILDREN; SHIPPING AND NAVIGATION; TRUSTS AND TRUSTEES.

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# CURTESY.

*See* HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL.

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# CUSTODY OF CHILDREN.

*See* BASTARDY; INFANTS AND CHILDREN.

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# CUSTODY OF DEEDS.

*See* SALE OF LAND.

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# CUSTODY OF PARISH DOCUMENTS.

*See* LOCAL GOVERNMENT.

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# CUSTOM AND USAGES.


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# Part I.—Nature of Custom.

## SECT. 1.—*Definition of Custom.*

Definition.

**418.** A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality (*a*), although contrary to or not consistent with the general common law of the realm (*b*). As regards the matter to which it relates a custom takes the place of the general common law, and is in respect of that matter the local common law within the particular locality where it obtains (*c*). Custom is unwritten law (*d*) peculiar to particular localities (*e*).

(*a*) *Tanistry Case* (1608), Dav. Ir. 29, at pp. 31, 32, where it is said that custom in the intendment of law is such a usage as has obtained *vim legis* and is in truth a binding law as regards the particular place, persons and things which it concerns.

(*b*) *Lockwood* v. *Wood* (1844), 6 Q. B. 50, Ex. Ch., *per* TINDAL, C.J., at p. 64. "A custom . . . is, in effect, the common law within that place to which it extends, although contrary to the general law of the realm."

(*c*) *Lockwood* v. *Wood, supra; Hammerton* v. *Honey* (1876), 24 W. R. 603, *per* JESSEL, M.R.

(*d*) "Custom may be defined to be a law or right not written, which being established by long use, and consent of our ancestors, hath been and daily is put in practice" (Termes de la Ley, *sub voce*); and see *Tanistry Case, supra*, at p. 32: "It is *jus non scriptum* and made by the people in respect of the place where the custom obtains. For where the people find any act to be good and beneficial, and apt and agreeable to their nature and disposition, they use and practise it from time to time, and it is by frequent iteration and multiplication of this act that the custom is made, and being used from a time to which memory runneth not to the contrary, obtains the force of law."

(*e*) 1 Bl. Com. 17.

SECT. 1. Definition of Custom.

A custom exists in a particular locality only in respect of some matter or matters; it does not preclude other matters within the same locality from being governed by the general common law.

Immemorial and local.

**419.** Customs have several essential characteristics which are noticed fully hereafter; but it is impossible to define a custom adequately without particularising the two essential and peculiar attributes which distinguish customs from all other legal conceptions. The one is the necessity of the existence of a custom, either actually or presumptively, from time immemorial, and the other is the confinement of all customs to a definite limited locality. The former of these essentials is fully dealt with later (*f*). As to the latter there is a well-defined rule that all customs must be local and confined to particular places. There cannot be a custom in one place to do something in another place (*g*). A custom must import some general right in a district (*h*). The land in a particular place and the inhabitants in respect of it may be charged by custom for matters within that place, but custom will not apply to matters out of it (*i*). A custom cannot extend to the whole realm, nor can it embrace every member of the public, for, in either case, it would then amount to the common law of the land (*j*).

Ambiguity of word "custom."

The word "custom" will be found to have been used, even by the highest legal authorities, to denote habits and usages not conforming to the essentials required by the foregoing definitions, but in its strict legal meaning it denotes exclusively an immemorial local custom (*k*).

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(*f*) See p. 222, *post*.

(*g*) *R.* v. *Ecclesfield* (*Inhabitants*) (1818), 1 B. & Ald. 348, *per* Lord ELLENBOROUGH, C.J., at p. 360; *R.* v. *Rollett* (1875), L. R. 10 Q. B. 469, *per* LUSH, J., at pp. 480, 481 (an alleged custom as to exemption from liability to repair highways); *Millar* v. *Taylor* (1769), 4 Burr. 2305, *per* YATES, J., at pp. 2367, 2368; *Jones* v. *Robin* (1847), 10 Q. B. 620, Ex. Ch., *per* PARKE, B., at p. 635; and see *Sowerby* v. *Coleman* (1867), L. R. 2 Exch. 96. In *Mounsey* v. *Ismay* (1863), 1 H. & C. 729, a custom for the inhabitants of Carlisle to hold horse races on a piece of land in a neighbouring extra-parochial hamlet once a year was held good: but the case was decided on demurrer, and the objection that the land was in another locality is not noticed in the judgments; but compare *Elwood* v. *Bullock* (1844), 6 Q. B. 383.

(*h*) *Millar* v. *Taylor*, *supra*, at p. 2367.

(*i*) *R.* v. *Ecclesfield* (*Inhabitants*), *supra*; *R.* v. *Rollett*, *supra*; *Dawson* v. *Willoughby* (1864), 5 B. & S. 920; *R.* v. *Ardsley* (1878), 3 Q. B. D. 255, C. C. R.

(*j*) See *Coventry* (*Earl*) v. *Willes* (1863), 12 W. R. 127, *per* COCKBURN, C.J., at p. 128: "There cannot be a custom as of right in all the Queen's subjects generally, inasmuch as the rights possessed by the Queen's subjects generally are part of the general law of the land, and not the customs of a particular place." See also *Gifford* v. *Yarborough* (*Lord*) (1828), 5 Bing. 163, H. L., at p. 164; *R.* v. *Rollett*, *supra*; Co. Litt. 110 b: "A custom cannot be alleged generally within the Kingdom of England: for that is the common law." See further, p. 229, *post*.

(*k*) For notable instances of this misuse of the term "custom," see *Wigglesworth* v. *Dallison* (1779), 1 Doug. (K. B.) 201 (a usage as to tenant farmers); *Gibson* v. *Crick* (1862), 1 H. & C. 142, at pp. 144, 145, 147; *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482, at pp. 484 *et seq.* (shippers' usage); *Brown* v. *Byrne* (1854), 3 E. & B. 703, at pp. 714 *et seq.* (a usage of the port of Liverpool); *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.*, [1908] 2 K. B. 907, C. A. (an alleged

SECT. 2. Distinction between Custom and Prescription.

## SECT. 2.—*Distinction between Custom and Prescription.*

Similarity to prescription.

**420.** Custom and prescription as modes of claiming rights are in many respects closely analogous; possession or user and time are inseparable incidents to both; and the possession must in each case be long, continual and peaceable (*l*). A claim under an alleged custom particularly resembles a claim by prescription at common law, unmodified by the provisions of the Prescription Act, 1832 (*m*).

Points of difference.

**421.** The chief point of difference between prescription and custom is that a claim by prescription is personal, that is to say, it is always made in the name of a certain person and his ancestors or those whose estate he has, or in a body corporate and its predecessors; while custom, being local, is not attached to any particular persons, but to a particular locality, and affects the property of the indeterminate number of persons for the time being connected with or being members of a particular class in that locality (*n*).

A claim by custom is, therefore, often available for those who cannot prescribe in their own name, nor in the name of any certain person, as for the inhabitants of a town (*o*) or manor.

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shippers' usage); *Hutcheson* v. *Eaton* (1884), 13 Q. B. D. 861, C. A., at p. 866; *Devonald* v. *Rosser & Sons*, [1906] 2 K. B. 728, C. A.

(*l*) Co. Litt. 113 b. See also *Rowles* v. *Mason* (1612), 2 Brownl. 192, *per* COKE, C.J.: "Prescription and custom are Brothers and ought to have the same Age, and Reason ought to be the Father and Congruence the Mother, and Use the nurse, and time out of memory to fortify them both"; *Warrick* v. *Queen's College* (1870), L. R. 10 Eq. 105, at pp. 121, 122, *per* Lord ROMILLY, M.R.: "The distinction between custom and prescription is a very thin one." See also *Mercer* v. *Denne*, [1904] 2 Ch. 534, at p. 556, *per* FARWELL, J.

(*m*) Prescription Act, 1832 (2 & 3 Will. 4, c 71).

(*n*) Coke distinguishes between prescription and custom in the following manner: "For the common law a prescription, which is personal, is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; or in bodies politic or corporate and their predecessors. And a custom, which is local, is alleged in no person, but laid within some manor or other place" (Co. Litt. 113 b.); *Austin* v. *Amhurst* (1877), 9 Ch. D. 689, 692; *Foiston* v. *Crachroode* (1587), 4 Co. Rep. 31 b, at 32 a; *Linn-Regis Corporation* v. *Taylor* (1684), 3 Lev. 160; "A custom is *lex loci*, and inherent in the soil whereto it is fixed for the service of everyone that is qualified to use it; whereas prescription is (fixed) in the person, and therefore ought always to be laid in persons or estates of perpetual existence, but it is otherwise of customs"; and see *Clarkson* v. *Woodhouse* (1792), 5 Term Rep., *per* Lord MANSFIELD, C.J., at p. 414, n: "Where an individual has enjoyed a right time out of mind, without being able to trace the origin or foundation of his right, a grant is presumed; and therefore, if the occupier of a certain messuage has enjoyed it, he must claim it by prescription; but when the claim depends on a general rule of property within certain limits, it is alleged as a custom, or *lex loci*: all local or real property must be governed by such law; it has no relation to persons out of the limits." See also *Mercer* v. *Denne*, [1904] 2 Ch. 534, where FARWELL, J., at p. 556, said that the difference between custom and prescription was "only that the right to the former must be claimed by or in respect of a locality, and to the latter by a person or corporation, but the rules affecting the subject-matter are in each case the same." See also *Champneys* v. *Buchan* (1857), 4 Drew. 104, at p. 109; and as to prescription generally, see titles EASEMENTS AND PROFITS À PRENDRE; REAL PROPERTY AND CHATTELS REAL.

(*o*) *Foiston* v. *Crachroode*, *supra*, at p. 32 a. "Where the claimant has a

SECT. 2. Distinction between Custom and Prescription.

The term "prescription" has sometimes been used in a sense embracing all titles to incorporeal hereditaments and rights *in alieno solo* based upon long usage (*p*). Such a meaning of the word includes title under a custom as well as title by prescription in its strict sense.

## SECT. 3.—*Distinction between Custom and Particular Trade or Local Usage.*

Distinction between custom and usage.

**422.** Immemorial local customs are clearly distinguishable from particular trade or local usages, although in practice frequently confused with them (*q*). The latter have chiefly to be considered in cases where they have been, or it is intended that they should be, imported as express or implied terms into commercial or other contracts (*r*): they lack three of the distinguishing features of customs properly so-called. First, they need not have existed from time immemorial (*s*). In the second place, they need not necessarily be confined to a limited locality (*t*). They may in fact be thus confined, as in the case of agricultural usages, which form a large proportion of the usages upheld in the courts as influencing contractual relationships (*a*), but such limitation or qualification as there may be in respect of such a usage is chiefly a limitation or qualification regarding the class or classes of persons affected by it (*b*). In the third place, usages, however extensive, if contrary to positive law will not be sanctioned by the courts (*c*), while customs may be inconsistent with the general law of the realm (*d*).

## SECT. 4.—*Essential Characteristics of Custom.*

### SUB-SECT. 1.—*In General.*

Essential attributes.

**423.** A custom to be valid must have four essential attributes. First, it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its

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weak and temporary estate, he cannot claim in his own right, but must have recourse either to the place, and allege a custom there; or if he prescribes in a *que* estate, it must be under cover of the tenant in fee" (*Bean* v. *Bloom* (1773), 2 Wm. Bl. 926, *per* DE GREY, C.J., at p. 927).

(*p*) See, for instance, *Lockwood* v. *Wood* (1844), 6 Q. B. 50, Ex. Ch., *per* TINDAL, C.J., at pp. 66 and 67; and see p. 238, *post*.

(*q*) As to particular trade or local usages, see p. 274, *post*.

(*r*) *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, C. A., *per* KAY, L.J., at p. 370; *Sewell* v. *Corp* (1824), 1 C. & P. 392, *per* BEST, C.J., at p. 393.

(*s*) See p. 252, *post*.

(*t*) See p. 219, *ante*; and p. 229, *post*.

(*a*) See p. 257, *post*.

(*b*) See, for instance, *Tucker* v. *Linger* (1883), 8 App. Cas. 508.

(*c*) *Goodwin* v. *Robarts* (1875), L. R. 10 Exch. 337, Ex. Ch., *per* COCKBURN, C.J., at p. 357: "We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law. To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle." See also *Dashwood* v. *Magniac*, *supra*, at p. 370.

(*d*) See p. 218, *ante*, and p. 225, *post*.

SECT. 4. Essential Characteristics of Custom.

immemorial origin; and, fourthly, it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect (*e*). These characteristics are the necessary corollaries of the definition of a custom as being local common law, but they serve a practical purpose as rules of evidence when the existence of a custom is to be established or refuted (*f*).

SUB-SECT. 2.—*Immemorial Existence.*

Immemorial existence.

**424.** Every custom must have been in existence from a time preceding the memory of man (*g*), a date which has long since been fixed at the year 1189, the commencement of the reign of Richard I. (*h*). Where, however, it is impossible to show such a continued existence, the courts will support the custom if circumstances be proved which raise a presumption that the custom in fact existed at that remote date (*i*). Evidence showing continuous user as of right as far back as living testimony can go is regarded as raising this presumption (*j*).

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(*e*) *Tyson* v. *Smith* (1838), 9 Ad. & El. 406, Ex. Ch., *per* TINDAL, C.J., at p. 421.

(*f*) *Hammerton* v. *Honey* (1876), 24 W. R. 603.

(*g*) Littleton's Tenures, s. 170; "No usage can be part of law, or have the force of a custom, that is not immemorial" (*Millar* v. *Taylor* (1769), 4 Burr. 2305, *per* YATES, J., at p. 2368; *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239, where WILLES, J., at p. 259, said, "a custom originating within time of memory even though existing in fact, is void at law"; 1 Bl. Com. 76, where it is said that to make a particular custom good it must "have been used so long that the memory of man runneth not to the contrary. So that if any one can shew the beginning of it, it is no good custom." This statement, however, requires qualification, for it is clear that it would be in no wise fatal to an alleged custom were an origin shown prior to 1189.

(*h*) *Chapman* v. *Smith* (1754), 2 Ves. Sen. 505, *per* Lord HARDWICKE, L.C., at p. 510: "Local common law, like general common law, is the law of the country as it existed before the time of legal memory, which is generally considered the time of Richard I. Thus, when people allege a custom, they allege that which they call a custom as having been the law of the place before the time of legal memory" (*Hammerton* v. *Honey*, *supra*, *per* JESSEL, M.R., at p. 603). As to how the time for the commencement of legal memory became fixed, see *Dalton* v. *Angus* (1881), 6 App. Cas. 740, *per* Lord BLACKBURN, at pp. 810, 811.

(*i*) *Jenkins* v. *Harvey* (1835), 1 Cr. M. & R. 877, *per* PARKE, B., at p. 894 (a custom for the mayor and burgesses of Truro and their lessees to exercise the office of meter, or measurer of certain goods imported by sea); *R.* v. *Joliffe* (1823), 2 B. & C. 54; *R.* v. *Rollett* (1875), L. R. 10 Q. B. 469, *per* LUSH, J., at p. 475 (an alleged custom for a parish to be exempt from liability to repair highways); *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344, *per* JOYCE, J., at p. 350 (a customary churchway for the parishioners to the parish church); *Mercer* v. *Denne*, [1904] 2 Ch. 534, *per* FARWELL, J., at p. 556 (a custom for fishermen inhabitants of a parish to dry their nets on the seashore).

(*j*) *Angus* v. *Dalton* (1877), 3 Q. B. D. 85, at p. 104, where COCKBURN, C.J., after referring to the inconvenience arising from the impossibility of carrying back the proof of possession or enjoyment to a period which, after a generation or two, ceased to be within the reach of evidence, said, "The judges provided a remedy by holding that if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed

Presumption favoured.

Again, if proof be given of facts from which it can be inferred that user corresponding to the alleged custom in fact existed at some time past, the existence of the custom from the remoter era will be inferred. The courts favour such an inference, and are slow to draw an inference of fact which would defeat a custom which has apparently existed for a long time (*k*). It is a maxim of the law of England to give effect to everything which appears to have been established for a considerable course of time, and to presume that that which has been done was done of right and not in wrong (*l*). It is a most convenient thing that every supposition not wholly irrational should be made in favour of long-continued enjoyment (*m*); consequently it is a rule of law that wherever there is an immemorial custom the court must presume everything possible which could give it a legal origin (*n*).

Rebutting evidence.

**425.** But the presumption thus raised is rebuttable, and may be displaced by any evidence which proves that the custom alleged did not exist or could not have existed in the time of Richard I. (*o*), or by tracing the origin of the usage to some other probable and more recent source, as where the only acts of usage proved can be shown to have been done under a revocable licence (*p*). The onus, however, lies on the person seeking to disprove the custom to demonstrate its impossibility if the existence of the custom has been proved for a long period (*q*).

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from time of legal memory, that is to say, from the time of Richard I." ; *Bastard* v. *Smith* (1837), 2 Mood. & R. 129, *per* TINDAL, C.J., at p. 136: "As to the proof of the custom, you cannot, indeed, reasonably expect to have it proved before you that such a custom did in fact exist before time of legal memory, that is, before the first year of the reign of Richard I.; for if you did, it would, in effect, destroy the validity of almost all customs; but you are to require proof, as far back as living memory goes, of a continuous, peaceable, and uninterrupted user of the custom." See also *Truro Corporation* v. *Rowe*, [1901] 2 K. B. 870, at p. 877, *per* WILLS, J.

(*k*) *Mercer* v. *Denne*, [1904] 2 Ch. 534, *per* FARWELL, J., at p. 556: "Not only ought the court to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present, unless such inference is irresistible, but it ought to presume everything possible to presume in favour of such a right."

(*l*) *Gibson* v. *Doeg* (1857), 2 H. & N. 615, *per* POLLOCK, C.B., at p. 623; *Heath* v. *Deane*, [1905] 2 Ch. 86, at p. 93.

(*m*) *Penryn Corporation* v. *Best* (1878), 3 Ex. D. 292, C. A., *per* BRAMWELL, L.J., at p. 299; *Heath* v. *Deane*, *supra*.

(*n*) *Cocksedge* v. *Fanshaw* (1779), 1 Doug. (K. B.) 118, *per* Lord MANSFIELD, at p. 132; *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344, *per* JOYCE, J., at p. 350 ; *Mercer* v. *Denne*, *supra*.

(*o*) *Hammerton* v. *Honey* (1876), 24 W. R. 603, *per* JESSEL, M.R., at p. 604; *Bastard* v. *Smith*, *supra* ; and see p. 233, *post*.

(*p*) *Mills* v. *Colchester Corporation* (1868), L. R. 2 C. P. 476 ; and see *Lockwood* v. *Wood* (1844), 6 Q. B. 50, Ex. Ch., at p. 68, where the origin of the usage in question was traced to a deed of 1646.

(*q*) *Mercer* v. *Denne*, *supra*, *per* FARWELL, J., at p. 555; and see *Hammerton* v. *Honey*, *supra*, *per* JESSEL, M.R., at p. 604, and p. 237, *post*. Thus, in *Simpson* v. *Wells* (1872), L. R. 7 Q. B. 214, a claim of a custom to set up stalls at the statute sessions for the hiring of servants was defeated by showing that these sessions were introduced by the Statutes of Labourers, the first of which was in the reign of Edward III.

SECT. 4. Essential Characteristics of Custom.

SUB-SECT. 3.—*Reasonable Nature.*

Custom must be reasonable.

**426.** A custom must be reasonable (*r*). If it be against reason it has no force in law (*s*). The reason here referred to is not to be understood as meaning every unlearned man's reason, but artificial and legal reason warranted by authority of law (*t*). Consequently a custom may be good although the particular reason for it cannot be assigned. It is sufficient if no good legal reason can be assigned against it (*u*). When, however, it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom (*v*).

Usage to prove custom.

**427.** Usage to prove a custom must be such usage as will prove a reasonable rule, for no amount of usage will establish an unreasonable local exception to the common law (*w*), and no custom which is bad in law is susceptible of proof (*a*). The judges will not admit mere usage to establish what they think unreasonable; and it is in this sense that they say that a custom must be reasonable (*b*).

Reasonable at time of inception.

**428.** The period for ascertaining whether a particular custom is reasonable or not is its inception (*c*). The commencement must be based on a reasonable cause, for if an alleged custom is unreasonable

(*r*) Co. Litt. 62 a; *Tanistry Case* (1608), Dav. Ir. 29, 32; *Tyson* v. *Smith* (1838), 9 Ad. & El. 406, Ex. Ch., at p. 421; *Broadbent* v. *Wilks* (1742), Willes, 360, in which case, speaking of an alleged custom for persons possessing coal mines to sink pits in the lands of others and to get coal, and to "lay the coals when got and the earth and rubbish etc. on the land near to such pits . . . there to remain and continue," WILLES, C.J., said, at p. 363: "Certainly no custom can be more unreasonable than the present. It may deprive the tenant of the whole profits of the land; for the lord or his tenant may dig coal pits when and so often as they please, and may in such case lay their coals etc. on any part of the tenant's land, if near to such coal pits, at what time of the year they please; for the custom as it is laid, does not say at convenient times, nor till they can be conveniently removed; nor does it say that they may be laid there for the necessary use or enjoyment of the pits. So they may be laid on the tenant's land and continue there for ever, though it may be more convenient for the lord to bring them on his own land, which is absurd and unreasonable" (see also 1 Bl. Com. 77; *Hix* v. *Gardiner* (1614), 2 Bulst. 195; *Hilton* v. *Granville* (*Earl*) (1844), 5 Q. B. 701; *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239, at p. 258; *Mercer* v. *Denne*, [1904] 2 Ch. 534, 551, affirmed [1905] 2 Ch. 538; *Johnson* v. *Clark*, [1908] 1 Ch. 303, 311; *Sowerby* v. *Coleman* (1867), L. R. 2 Exch. 96 (an alleged custom for the inhabitants of a parish to exercise and train horses at all reasonable times of the year in a place beyond the limits of the parish); *Bastard* v. *Smith* (1837), 2 Mood. & R. 129 (alleged custom of Devonshire miners to divert water into their mines); *Fryer* v. *Johnson* (1755), 2 Wils. 28 (an alleged custom to bury as near as possible to ancestors).

(*s*) Co. Litt. 62 a.

(*t*) *Ibid.*

(*u*) 1 Bl. Com. 77.

(*v*) *Salisbury* (*Marquis*) v. *Gladstone* (1861), 9 H. L. Cas. 692, *per* Lord CRANWORTH, L.C., at p. 701; *Johnson* v. *Clark*, *supra*, *per* PARKER, J., at p. 309.

(*w*) *Hammerton* v. *Honey* (1876), 24 W. R. 603, *per* JESSEL, M.R.; *Johnson* v. *Clark*, *supra*.

(*a*) *Johnson* v. *Clark*, *supra*.

(*b*) *Hammerton* v. *Honey*, *supra*.

(*c*) *Mercer* v. *Denne*, [1904] 2 Ch. 534, *per* FARWELL, J., at p. 557; *Johnson* v. *Clark*, *supra*.

in its origin, no usage or continuance can make it good (*d*). An alleged custom which is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason; for it could not have had a reasonable commencement (*e*). Alleged customs which appear to have had no reasonable commencement, but which appear to have been founded in wrong and usurpation, and not on the voluntary consent of the people to whom they relate, are counted unreasonable and are void in law (*f*).

Grounds for holding custom reasonable.

A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the general common law of the realm—that is to say, that, since customs in general involve some inconsistency with the rules of the common law, the fact of this inconsistency is not of itself a reason for holding a particular custom bad upon the ground of its being therefore unreasonable (*g*), nor because it is prejudicial to the interests of an individual, if the custom be for the benefit of the community at large (*h*).

What is reasonable.

**429.** Since every custom sanctioned by the courts must be reasonable, it follows that every case where a custom has been upheld by the courts is an example of a reasonable custom. Each case, of course, depends upon its own peculiar facts, and no hard and fast rule can be laid down. Customs, however, have been held to be reasonable in many cases on the ground that they confer a benefit on a large class of the community, and do not unduly or unjustly restrict the rights of the public or individuals (*i*).

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(*d*) *Tanistry Case* (1608), Dav. Ir. 29, at p. 32: "The commencement of a custom (for every custom hath a commencement, altho' the memory of man doth not extend to it, as the river Nile hath a spring, altho' geographers cannot find it) ought to be upon reasonable ground and cause, for if it was unreasonable in the original no usage or continuance can make it good. *Quod ab initio non valuit, tractu temporis non convalescet.*"

(*e*) *Tyson* v. *Smith* (1838), 9 Ad. & El. 406, Ex. Ch., at pp. 421, 422, *per* TINDAL, C.J.; *Tanistry Case*, *supra*, at p. 33.

(*f*) *Tyson* v. *Smith*, *supra*, *per* TINDAL, C.J., at p. 422; see also *Tanistry Case*, *supra*, at p. 33: "Several customs which have been adjudged void in our books as being unreasonable against common right, or purely against law, if their nature and quality be considered, will be found injurious to the multitude and prejudicial to the commonwealth, and to have their commencement (for the most part) by oppression and extortion of lords and great men."

(*g*) "*Consuetudo ex certâ causâ rationabili usitata privat communem legem*" (Co. Litt. 113 a; *Tyson* v. *Smith*, *supra*, at p. 421; *Tanistry Case*, *supra*; but compare *Johnson* v. *Clark*, [1908] 1 Ch. 303, *per* PARKER, J., at p. 318).

(*h*) *Tyson* v. *Smith*, *supra*, *per* TINDAL, C.J., at p. 421; *Tanistry Case*, *supra*: "A custom may be prejudicial to the interest of a particular person and reasonable also, where it is for the benefit of the commonwealth in general, as a custom to make bulwarks on the ground of another for the defence of the realm . . . and to pull down houses in a public fire . . . so to turn the plough on the headland of another in favour of husbandry, and to dry nets on the land of another in favour of fishing and navigation." As to the two latter customs, see *Pain* v. *Patrick* (1690), 3 Mod. Rep. 289, at p. 294; *Lockwood* v. *Wood* (1844), 6 Q. B. 50, Ex. Ch., at p. 64; *Race* v. *Ward* (1855) 4 E. & B. 702, at p. 710; and *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.; compare *Simpson* v. *Bithwood* (1691), 3 Lev. 307, 308; and *Fawcett* v. *Lowther* (1751), 2 Ves. Sen. 300; see also *Lanchbury* v. *Bode*, [1898] 2 Ch. 120 (a custom for the owner of the great tithes to keep a bull and a boar for the common use of the parishioners).

(*i*) *Simpson* v. *Bithwood*, *supra* (a custom to take the best anchor and cable of any ship wrecked on the shore, in consideration of affording relief to her

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In other cases, an alleged custom has been held to be unreasonable on the ground that it would entail unnecessary expense or throw an unjust or disproportionate burden on some individuals for the benefit of others (*j*), or on the ground that it would destroy the subject-matter of the right (*k*). For this last reason a *profit à prendre* cannot be acquired by custom (*l*).

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occupants and protecting her cargo); *Napper* v. *Mansell* (1622), cited in *Hill* v. *Bunning* (1660), Sid. 17, at p. 18 (a custom for a corporation of a town to have so much per ton for every incoming vessel); *Hill* v. *Hanks* (1614), 2 Bulst. 201 (a custom for a bellman employed by an ancient corporation to sweep the streets and market, to take by way of remuneration a share of every sack opened in the market for sale); *Tyson* v. *Smith* (1838), 9 Ad. & El. 406, Ex. Ch. (a custom within a certain area for every victualler to enter on land when a fair was being held on certain days in the year, and to erect a booth or stall, and for this privilege to pay the owner the sum of twopence when lawfully demanded); *Elwood* v. *Bullock* (1844), 6 Q. B. 383 (a custom for victuallers to erect booths in a highway during a fair, leaving sufficient room for the passage of horses and carts; *per* Lord DENMAN, C.J., at p. 411: "The existence of a fair is treated in our law books as a matter of public convenience; and the reasons for so considering it are also entirely of a public nature. If, therefore, the custom disclosed in the replication may have had a legal origin, there seems to be nothing unreasonable in it, as abridging a public right without a countervailing benefit; such benefit may be well supposed to arise from the accommodation afforded to the persons frequenting the fair"); *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A. (a custom for the inhabitants of a parish carrying on the trade or business of fishermen to use a piece of land covered with shingle to spread and dry their nets upon it); *Rogers* v. *Brenton* (1847), 10 Q. B. 26 (a custom by which tin bounders in Cornwall could mark out a plot on waste land, provided they dug for the tin and paid a royalty to the owner of the land); *Gard* v. *Callard* (1817), 6 M. & S. 69 (a custom to grind malt at a particular mill and for the mill-owner to receive a toll).

(*j*) *Barker* v. *Cocker* (1620), Hob. 329, where an alleged custom that lambs bred upon any one tenement in a particular parish, although belonging to different owners, should be reckoned together for the purpose of contributing to the tithe, so that one-tenth of the lambs could be taken, irrespective of their ownership, was rejected on the ground that if the custom were valid it might happen that one owner possessing only one lamb might have to pay that lamb while the owner of many lambs might have to pay nothing; *Taylor* v. *Scott* (1729), Fitz-G. 55, where an alleged custom for every inhabitant having a child born in a parish to pay a churching fee at the time of churching the mother of the child, or at the usual time after her delivery when she should be churched, or at the usual times when the mother of such child should be churched, was bad, because the custom would oblige the husband to pay whether his wife was churched or not; *Coriton* v. *Lithby* (1671), 1 Vent. 167, where an alleged custom for tenants of a manor to grind all the corn spent in their houses was rejected, because all corn does not require grinding before being spent; *Hilton* v. *Granville* (*Earl*) (1844), 5 Q. B. 701 (an alleged custom for persons digging mines to be free from liability for letting down the surface and thereby damaging other persons' buildings); *Rogers* v. *Brenton*, *supra* (claim by tin bounders in Cornwall to retain claims by merely renewing the boundary posts without working the tin). See also *Wakefield* v. *Buccleuch* (*Duke*) (1867), L. R. 4 Eq. 613, at p. 650; *Broadbent* v. *Wilks* (1742), Willes, 360; *Rockey* v. *Huggens* (1631), Cro. Car. 220 (claim by a copyholder for life to cut down and sell timber trees); *Blackett* v. *Bradley* (1862), 1 B. & S. 940; *Rogers* v. *Taylor* (1857), 1 H. & N. 706.

(*k*) *Race* v. *Ward* (1855), 4 E. & B. 702. See also *Clayton* v. *Corby* (1843), 5 Q. B. 415 (claim to take clay from another's land for making bricks); *Bland* v. *Lipscombe* (1854), 4 E. & B. 713, n. (an alleged custom for the inhabitants of a parish to fish); *A.-G.* v. *Mathias* (1858), 4 K. & J. 579; and see p. 241, *post*.

(*l*) See p. 238, *post*, and title EASEMENTS AND PROFITS À PRENDRE; *Gateward's Case* (1607), 6 Co. Rep. 59 b; *Davies' Case* (1688), 3 Mod. Rep. 246 (alleged

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Reasonable nature a question for the court.

**430.** Whether or not a custom is reasonable is a question of law for the court, and not a question of fact for the jury (*m*). But the jury may thus far properly look into the nature of the alleged custom, that if they find it greatly affecting the rights of private property they may fairly expect and require that it should be supported by evidence proportionally strong and convincing (*n*).

SUB-SECT. 4.—*Certainty.*

Certainty.

**431.** A custom must be certain (*o*). Not only should the custom as alleged point out clearly and certainly the principle or rule of the custom, but that principle or rule so pointed out must be one which is definite and certain, so that by the application of it to each particular case it may be shown with certainty what are the rights which the custom gives in that case (*p*). There must be some definite limit to the right claimed to exist under an alleged custom—in respect of its nature generally (*q*), in respect of the locality where the custom is alleged to exist (*r*),

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custom for the tenants of a manor to fowl in the warren of another); *Bland* v. *Lipscombe* (1854), 4 E. & B. 713, n. (claim by inhabitants to fish in private water); *Constable* v. *Nicholson* (1863), 14 C. B. (N. S.) 230 (claim to take gravel, followed in *Hough* v. *Clark* (1907), 23 T. L. R. 682); *Pitts* v. *Kingsbridge Highway Board* (1871), 19 W. R. 884 (claim by the inhabitants of a parish to take shingle from private property in order to repair parish highways); *Commissioners of Sewers of the City of London* v. *Glass* (1872), 7 Ch. App. 456, 465; *Allgood* v. *Gibson* (1876), 34 L. T. 883 (alleged custom for the inhabitants of a manor to have a common of fishery in the lord's water); *Chilton* v. *London Corporation* (1878), 7 Ch. D. 735 (claim for the inhabitants of a parish to lop branches growing upon the waste lands of the manor); *Rivers* (*Lord*) v. *Adams* (1878), 3 Ex. D. 361 (alleged custom for inhabitants of a parish to cut fagots on a common); *De la Warr* (*Earl*) v. *Miles* (1881), 17 Ch. D. 535, C. A., at p. 577; *Tilbury* v. *Silva* (1890), 45 Ch. D. 98, C. A. (claim by inhabitants to a right of fishing); *Fitzhardinge* (*Lord*) v. *Purcell*, [1908] 2 Ch. 139, 163 (an alleged custom for the inhabitants of certain manors, being wild fowlers, to shoot wild fowl on another's land).

(*m*) *Bastard* v. *Smith* (1837) 2 Moo. & R. 129, at p. 135; Co. Lit. 113 a.

(*n*) *Ibid.*, *per* TINDAL, C.J., at p. 135.

(*o*) *Tanistry Case* (1608), Dav. Ir. at p. 33; *Tyson* v. *Smith* (1838), 9 Ad. & El. 406, Ex. Ch., at p. 421; *Taylor* v. *Scott* (1729), Fitz-G. 55; *Blewett* v. *Tregonning* (1835), 3 Ad. & El. 554; *Mercer* v. *Denne*, [1904] 2 Ch. 534, at p. 551; affirmed [1905] 2 Ch. 538, C. A.; see also *Clayton* v. *Corby* (1843), 5 Q. B. 415; *Broadbent* v. *Wilks* (1742), Willes, 360, *per* WILLES, C.J.: "That every custom must be certain is laid down as a rule in all the books, which treat of customs. It is said of a custom as by way of definition, that *consuetudo ex certa et rationabili causa privat communem legem*, and it must be certain because, if it be not certain, it cannot be proved to have been time out of mind; for how can anything be said to have been time out of mind when it is not certain what it is?"

(*p*) *Champneys* v. *Buchan* (1857), 4 Drew. 104, at p. 116, *per* KINDERSLEY, V.-C.; and see *Wilson* v. *Miller* (1806), 7 East, 121, *per* Lord ELLENBOROUGH, C.J.

(*q*) *Mercer* v. *Denne*, *supra*; *Champneys* v. *Buchan*, *supra*.

(*r*) See *Beresford* v. *Bacon* (1686), 2 Lut. 1317, where the defendant, who alleged a custom as an excuse for trespass, failed, "Because the custom was not alleged to be within any manor, vill, parish, etc., or to be the custom of any county, hundred, etc." The proposition in the text that a custom must be certain frequently occurs in the reports. It has been explained by JESSEL, M.R., in *Hammerton* v. *Honey* (1876), 24 W. R. at p. 603, as follows: "When we are told that custom must be certain—that relates to the evidence of a custom.

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and in respect of the persons alleged to be affected by the custom (*s*).

User wider than the custom.

The usage whereby it is sought to prove the custom must not be of a nature too wide to support the custom as alleged (*t*). Where, however, user of an alleged right, claimed to exist under an alleged custom, is proved to such an extent that it exceeds such rights as there may be under the custom, and such excess of user is referable to the unauthorised user by strangers to the custom, such excess of user will not invalidate the custom merely on the ground of uncertainty (*u*).

Custom must be certain.

**432.** If the alleged custom be uncertain in its general nature it will be void, as, for instance, an alleged custom to play any rural games on a particular close (*a*), or to remove drifted sand (*b*), or to lay coals near to a pit (*c*).

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There is no such thing as law which is uncertain—the notion of law means a certain rule of some kind."

(*s*) *Fitch* v. *Rawling* (1795), 2 Hy. Bl. 394, at p. 399, *per* BULLER, J.

(*t*) *Hammerton* v. *Honey* (1876), 24 W. R. 603, where JESSEL, M.R., at p. 604, referring to the nature of the usage necessary to support a custom, said: "It must not only be consistent with the custom alleged, but, if I may use the expression, not be too wide. For instance, if you allege a custom for certain persons to dance on a green, and you prove in support of that allegation, not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom. It is not confined to what you say it is, and if your evidence is good for anything you prove a great deal more than you have alleged. You cannot select a bit of the practices proved, which might possibly have a legal origin, and say that the evidence must be rejected which would show that bit to be only a small part, say one-twentieth, of the whole usage of which the remaining nineteen-twentieths may be utterly incapable of legal origin, and therefore that the one-twentieth must be assumed to have had a legal origin. I know there have been some observations made in cases which come to this—that the general legal usage is not destroyed because an occasional illegal usage is shown; but that does not apply where you have evidence of a totally different state of things which does not support a local custom at all"; *Farquhar* v. *Newbury Rural Council*, [1908] 2 Ch. 586, at p. 589, where WARRINGTON, J., found that the user of a roadway was too wide to support an alleged customary churchway confined to the inhabitants of the parish, affirmed [1909] 1 Ch. 12, C. A.

(*u*) See *Hammerton* v. *Honey*, *supra*, *per* JESSEL, M.R., at p. 604. But compare *Farquhar* v. *Newbury Rural Council*, *supra*.

(*a*) *Millechamp* v. *Johnson* (1746), Willes, 205, n., where the custom was alleged in all the inhabitants of a particular town for the time being. The court was of opinion that the custom as laid extending to any rural sports was too general and uncertain.

(*b*) *Blewett* v. *Tregonning* (1835), 3 Ad. & El. 554 (an alleged custom for all the inhabitants for the time being of a parish to have the right of entering a particular close at all seasonable times of the year and of collecting and carrying away reasonable quantities of sand drifted on to the land by the wind). Lord DENMAN, C.J., at p. 574, said: "It is clear that this cannot be a good custom. The sand, the article claimed, is a part of the soil, and inseparable from it. And, if there were a distinction capable of being ascertained, there must surely be a limitation of the alleged right, as to time. It cannot be said that the inhabitants may take the sand which has drifted, at any distance of time; that would place the whole soil at the mercy of any person claiming under the custom"; and WILLIAMS, J., at p. 575, said: "The custom alleged is uncertain, indefinite, and absurd. In point of fact there can be no rule for ascertaining, in a case like this, what is sand blown from the seashore, and what is the original soil."

(*c*) *Broadbent* v. *Wilks* (1742), Willes, 360, where an alleged custom for

SECT. 4. Essential Characteristics of Custom.

Custom must be certain as to locality.

**433.** A custom must also be certain in respect of the locality where it is alleged to exist; for every custom must be local (*d*); and cannot be alleged as existing throughout the whole realm (*e*). Some definite limit must therefore be assigned to the area wherein the custom is said to obtain. This area must be defined by reference to the limits of some recognised division of land, as for instance a town (*f*), a hundred (*g*), a parish (*h*), a manor (*i*), a township (*k*), a borough (*l*), a vill (*m*), a hamlet and a city (*n*), a liberty (*o*), several manors (*p*), a county (*q*), or an honour (*r*).

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persons owning coal mines to sink pits in another's land and to lay the coals when got on the land *near* to such pits there to remain and continue was held bad among other reasons upon the ground of uncertainty. In this case WILLES, C.J., said, at p. 363: "The word 'near' is not intelligible; but to make it certain and intelligible, it should be 'nearest' or 'adjoining.' Supposing many lands and of different persons lay within a small distance, some ten yards off, and some twenty etc.; which of these lands must be said to be *near* within the meaning of this custom. The custom, that is laid, is to take and carry away part of the coals placed there, and to burn and make into cinders the other parts thereof, not saying what part, nor how long it is to lie there. So in this respect the custom is likewise quite uncertain." But compare *Carlyon* v. *Lovering* (1857), 1 H. & N. 784, at p. 800, where an alleged custom for miners working and winning tin and other minerals capable of being dug or won from any mine near a stream of water flowing by such mine to enjoy the right of washing away all or any part of the sand, stones, rubble and other stuff which should become dislodged or severed in the course of working the mine was held not open to the objection of uncertainty.

(*d*) "A custom which is local, is alleged in no person, but laid within some manor or other place" (Co. Litt. 113 b). See also *Millar* v. *Taylor* (1769), 4 Burr. 2305, at p. 2368.

(*e*) "A custom cannot be alleged generally within the Kingdom of England; for that is the common law" (Co. Litt. 110 b, and p. 219, *ante*).

(*f*) Co. Litt. 110 b.

(*g*) *Ibid.*

(*h*) *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A. (a custom for fishermen inhabitants of a parish to spread their nets to dry on the land of a private owner on the shore); *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344 (a custom for the inhabitants of a parish to a churchway through the demesne land of a manor).

(*i*) *Tyson* v. *Smith* (1838), 9 Ad. & El. 406, Ex. Ch. (a custom for victuallers to enter a part of the waste of a manor to be indicated by the lord, and to erect booths during the times of fairs); Co. Litt. 110 b.

(*k*) *Race* v. *Ward* (1855), 4 E. & B. 702 (a custom for the inhabitants of a township to enter a private owner's close and take water from a spring).

(*l*) *R.* v. *Joliffe* (1823), 2 B. & C. 54 (a custom in an ancient borough for the steward of a court leet to nominate certain persons to the bailiff, to be summoned on the jury); Co. Litt. 110 b.

(*m*) *Abbot* v. *Weekly* (1665), 1 Lev. 176 (a custom for the inhabitants of a vill to dance on certain land at all times of the year, at their free will and for their recreation).

(*n*) *Mounsey* v. *Ismay* (1863), 1 H. & C. 729 (a custom in a hamlet and in the city of Carlisle for the freemen and citizens on a particular day of the year to enter a close and hold horse-races there); Co. Litt. 110 b.

(*o*) *Grant* v. *Kearney* (1823), 12 Price, 773 (a claim to perambulate the boundaries of the Liberty of the Rolls, and for that purpose to pass through the kitchen garden of Lincoln's Inn).

(*p*) *Fitzhardinge* (*Lord*) v. *Purcell*, [1908] 2 Ch. 139 (an alleged custom for inhabitants of several manors to shoot wild fowl on another's land).

(*q*) *Anon.* (1481), Y. B. 21 Edw. 4, 28 b, cited in *Beresford* v. *Bacon* (1686), 2 Lut. 1317; Co. Litt. 110 b; *Bastard* v. *Smith* (1837), 2 Mood. & R. 129 (alleged custom in Devonshire for tin miners to divert water into their mines).

(*r*) Co. Litt. 110 b.

SECT. 4. Essential Characteristics of Custom.

It is not sufficient that the area where a custom is alleged to obtain is a mere geographical district, however clearly defined, for in this case there would be no apparent reason for the existence of a separate custom affecting the whole district (*a*); but the authorities on this point do not appear to be unanimous (*b*).

Locality may vary.

**434.** The area affected by the exercise of the custom may, however, consist of any defined space, and its boundaries may vary from time to time, provided the area is sufficiently clearly defined at any particular moment. Thus the fact that the *locus in quo* is subject to variation by reason of the encroachment or receding of the sea will not invalidate an alleged custom (*c*).

Custom and property must be in same locality.

**435.** A custom cannot exist in one locality which relates to matters and property situate in another locality (*d*).

Custom must be certain as to persons.

**436.** A custom must be certain in respect of the persons or classes of persons whom it is alleged to affect. Thus, a custom extending to all the poor householders in a particular township has been held void for uncertainty (*e*). It must be limited to a particular class of persons or section of the public (*f*), which must be

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(*a*) *Edwards* v. *Jenkins*, [1896] 1 Ch. 308, where KEKEWICH, J., at p. 313, referring to the *dictum* of COCKBURN, C.J., in *Coventry* (*Earl*) v. *Willes* (1863), 9 L. T. 384, that a customary right can only be applicable to certain inhabitants of the district where the custom is alleged to exist, says: "I do not find in any of the cases anything that would justify me in saying that the use of the word 'district' means more than the particular division known to the law in which the particular property is situate. It may be situate in a parish, or in a manor, or there might be some other division. But I cannot see how a number of parishes can, without specific evidence, be said to be situated in a particular district so that land in one of the parishes is land in a particular district"; and see the doubt raised by JOYCE, J., in *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344, at p. 353, whether the inhabitants of certain tenements in a manor could claim by custom.

(*b*) *Pain* v. *Patrick* (1690), 3 Mod. Rep. 289, where a custom that the inhabitants of Littleport living in ancient houses should have a free right of ferry was held good; *Harrop* v. *Hirst* (1868), L. R. 4 Exch. 43 (a custom for the inhabitants of a district to take water from a spout in the highway); and *quære* whether the reasoning of KEKEWICH, J., in *Edwards* v. *Jenkins*, *supra*, is not based on a mistaken notion as to the necessity for showing a possible origin for the custom; see p. 232, *post*; *Mounsey* v. *Ismay* (1863), 1 H. & C. 729.

(*c*) *Mercer* v. *Denne*, [1905] 2 Ch. 538, at pp. 579, 584, where the Court of Appeal held that physical variations in the seashore from time to time did not render it impossible to define with sufficient certainty the land affected by a custom for fishermen to dry their nets upon land adjoining the beach, so as to make the custom void for uncertainty; and see S. C., [1904] 2 Ch. 534, *per* FARWELL, J., at p. 556, "it cannot be necessary to define the limits of land affected by a custom more clearly than those of land comprised in a grant for the same purpose."

(*d*) *Gateward's Case* (1607), 6 Co. Rep. 59 b, at 61 a; *R.* v. *Ecclesfield* (*Inhabitants*) (1818), 1 B. & Ald. 348, at p. 360; *Edwards* v. *Jenkins*, *supra*, at p. 313; *Sowerby* v. *Coleman* (1867), L. R. 2 Exch. 96. See, however, *Mounsey* v. *Ismay*, *supra*, where a custom for the inhabitants of the city of Carlisle to hold horse-races in a neighbouring hamlet was held good. This point, however, was apparently not raised in argument.

(*e*) *Selby* v. *Robinson* (1788), 2 Term Rep. 758.

(*f*) *Fitch* v. *Rawling* (1795), 2 Hy. Bl. 394, *per* BULLER, J., at p. 399: "How that which may be claimed by all the inhabitants of England can be the subject of a custom, I cannot conceive. Customs must, in their nature,

SECT. 4. Essential Characteristics of Custom.

defined with certain limitations, and the categories of persons so defined must be free from vagueness or uncertainty (*g*). There cannot be a custom as of right in all the King's subjects generally, inasmuch as the rights possessed by the King's subjects are part of the general law of the land, and not the customs of a particular place (*h*).

It is, however, no objection to the validity of a custom that the persons affected by it are a fluctuating body (*i*); or that they form a body which, because of its indefiniteness, is incapable of receiving a grant of the rights which are claimed to exist under an alleged custom (*k*).

Custom may impose burden on particular class.

**437.** A custom may impose a burden on one class of persons for the benefit of another, as in the case of customs connected with the repair of roads (*l*).

SUB-SECT. 5.—*Continuity.*

Continuity.

**438.** A custom to be valid must have continued without interruption since time immemorial (*m*). There must be long, continuous, habitual usage. Consequently, when there has been interruption or disturbance of the usage, acquiesced in by the persons who are alleged to be entitled to exercise the right, and who have not either by legal or illegal means attempted to prevent the disturbance or interference, and the disturbance or interruption has not been for a short time, but for many years, a strong presumption arises that there never was any such custom as that alleged at all (*n*).

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be confined to individuals of a particular description, and what is common to all mankind, can never be claimed as a custom."

(*g*) Thus, in *Selby* v. *Robinson* (1788), 2 Term Rep. 758, an alleged custom for the poor householders residing within a certain township to gather and carry away rotten wood from the branches of trees in a certain close was held bad, because it was impossible to ascertain who was entitled to the right under the alleged custom, the description, "poor householders," being too vague and uncertain.

(*h*) *Coventry* (*Earl*) v. *Willes* (1863), 12 W. R. 127, 128, *per* COCKBURN, C.J.; *Bourke* v. *Davis* (1889), 44 Ch. D. 110, at p. 125; *Fitch* v. *Rawling* (1795), 2 Hy. Bl. 394, at p. 399; *Dungarvan Guardians* v. *Mansfield*, [1897] 1 I. R. 420; and compare *Steel* v. *Houghton* (1788), 1 Hy. Bl. 51; and see p. 219, *ante*.

(*i*) In the great majority of cases where customs have been alleged and established the claims have been set up by a person as a member of some undefined and fluctuating body of persons. The mode of claiming rights under an alleged custom owes its prevalence largely to its being available to persons who are for some reason unable to claim the rights by prescription; see *Foiston* v. *Crachroode* (1587), 4 Co. Rep. 31 b.

(*k*) See, for instance, *Abbot* v. *Weekly* (1665), 1 Lev. 176, and *Hall* v. *Nottingham* (1875), 1 Ex. D. 1, and compare *Lancashire* v. *Hunt* (1894), 11 T. L. R. 49, C. A.

(*l*) *R.* v. *Ecclesfield* (*Inhabitants*) (1818), 1 B. & Ald. 348 (a custom that the inhabitants of certain divisions of a parish should repair the roads in the parish); *R.* v. *Barnoldswick* (*Inhabitants*) (1843), 4 Q. B. 499 (a custom for the inhabitants of a township to repair the highways in the township); *London and North Western Rail. Co.* v. *Fobbing Levels Sewers Commissioners* (1896), 75 L. T. 629 (a custom for the owners of land adjoining a tidal river to repair the sea-walls).

(*m*) See *Tanistry Case* (1608), Dav. Ir. 32; *Tyson* v. *Smith* (1838), 9 Ad. & El. 406, Ex. Ch., *per* TINDAL, C.J., at p. 421; *Simpson* v. *Wells* (1872), L. R. 7 Q. B. 214; and p. 222, *ante*.

(*n*) *Hammerton* v. *Honey* (1876), 24 W. R. 603, *per* JESSEL, M.R.

SECT. 4. Essential Characteristics of Custom.

Interruptions.

**439.** There is, however, a distinction between an interruption of the right which forms the subject-matter of the custom, and an interruption in the possession of that right, or the user and enjoyment of that right (*o*). If there be an interruption of the right, no matter for how short a period, the right is extinguished; and, if it were possible to revive it, its revival would involve a new beginning within time of legal memory, and thereupon the custom would be void (*p*). But as regards interruption of the possession or enjoyment of the right, such an interruption may occur and continue for ten or twenty years, without destroying the custom, the effect of such an interruption being merely to render the custom more difficult of proof (*q*).

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# Part II.—Creation, Enjoyment, and Proof of Custom.

## SECT. 1.—*Creation and Origin.*

Origin need not be proved.

**440.** It is not incumbent upon a person seeking to establish an alleged custom to show how it originated. Provided the custom be immemorial, certain, and reasonable in itself, and conforms to the requirements already referred to (*r*), it is unnecessary to trace it to its origin (*s*), or even to show that it might have had a legal origin (*t*) otherwise than by an Act of Parliament, or a grant from

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(*o*) 1 Bl. Com. 77; Co. Litt. 114 b; *Mercer* v. *Denne*, [1904] 2 Ch. 534, *per* FARWELL, J., at p. 556, affirmed [1905] 2 Ch. 538, C. A.

(*p*) 1 Bl. Com. 77. As to extinguishment, see p. 241, *post*.

(*q*) *Ibid.*; *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A. See also *Scales* v. *Key* (1840), 11 Ad. & El. 819, where no instance of the enjoyment of the right could be shown since 1689, and p. 235, *post*.

(*r*) See pp. 221 *et seq.*, *ante*.

(*s*) *Lockwood* v. *Wood* (1844), 6 Q. B. 50, Ex. Ch., *per* TINDAL, C.J., at p. 64. See also *Pain* v. *Patrick* (1690), 3 Mod. Rep. at p. 293, where it is pointed out by way of example that the origin of the custom of gavelkind and borough English is unknown.

(*t*) *Gateward's Case* (1607), 6 Co. Rep. 59 b, *per* COKE, C.J.: "Every prescription ought to have by common intendment a lawful beginning, but otherwise it is of custom, for that ought to be reasonable, but need not be intended to have a lawful beginning as custom to have land devisable or of the nature of gavelkind. These and the like custom are reasonable, but by common intendment they cannot have a lawful beginning, by no grant, or act or agreement but only by Parliament." See *Cocksedge* v. *Fanshaw* (1779), 1 Doug. (K. B.) 118, *per* Lord MANSFIELD, at p. 132: "The rule of law is, that whenever there is an immemorial usage, the court must presume everything possible which could give it a legal origin"; and *R.* v. *Rollett* (1875), L. R. 10 Q. B. 469, *per* LUSH, J., at p. 476: "It is not necessary in pleading a custom to state how it originated. It is sufficient to allege the fact that it existed from time immemorial." See also *R.* v. *Ecclesfield* (*Inhabitants*) (1818), 1 B. & Ald. 348; and *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344, 350.

the Crown incorporating by charter the persons who are to enjoy the right (*u*).

The doctrines of prescription and custom are on quite different footings as regards the necessity of inquiry into the origin of rights alleged to exist under them respectively. In order that a claim by prescription may succeed, the right which is alleged to exist must be such as could have formed the subject-matter of a grant (*a*); whereas the subject-matter of a custom need not have been capable of being created by an ordinary deed of grant (*b*).

Legal memory.

**441.** If a custom is proved to have in fact existed in 1189 (*c*), *i.e.*, the first year of the reign of Richard I., and to have continued ever since; or, if it be shown that it has existed for a number of years, and the circumstances are such as to raise the presumption of its existence from the remoter era, and no evidence is forthcoming to rebut this presumption, inquiry into the origin of the custom is wholly unnecessary for the purpose of establishing the custom. For no evidence would be admissible for the purpose of showing that the origin was, in fact, prior to 1189, and was, in fact, wrongful. The doctrine of prescription, using the word in the widest sense, in such cases precludes any question as to the validity of the custom (*d*), provided only that it be not unreasonable (*e*). The discovery of the actual origin of a practice which is relied upon as proving the existence of a custom may, however, be effectual to show that the custom did not, in fact, exist. Thus, if the habit can be shown to have originated in wrong, or usurpation, or in some unreasonable manner (*f*), or to have owed its origin to an invalid grant (*g*), or to have first existed subsequently to the year 1189 (*h*), the presumption raised by proof of the enjoyment of the alleged custom in more recent times will be rebutted and the alleged custom will fail. Judicial authority has not been entirely unanimous in

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(*u*) See *A.-G.* v. *Wright*, [1897] 2 Q. B. 318, C. A., as an example of a case where the evidence authorised the presumption of a grant from the Crown or of a grant from persons who took under the Crown.

(*a*) *Lockwood* v. *Wood* (1844), 6 Q. B. 50, Ex. Ch., *per* TINDAL, C.J., at p. 64: "In the case of prescription, which founds itself upon the presumption of a grant that has been lost by process of time, no prescription can have had a legal origin when no grant could have been made to support it"; and see title EASEMENTS AND PROFITS À PRENDRE.

(*b*) *Rowles* v. *Mason* (1612), 2 Brownl. 192, *per* COKE, C.J., at p. 198: "Nothing may be good by prescription, but that which may have beginning by grant, . . . custom holds place in many cases, which cannot be by grant." And see *Gateward's Case* (1607), 6 Co. Rep. 59 b.

(*c*) The year 1189 is regarded in law as the commencement of legal memory. See the judgment of Lord BLACKBURN in *Dalton* v. *Angus* (1881), 6 App. Cas. 740, at pp. 810, 811.

(*d*) *Bedle* v. *Beard* (1607), 12 Co. Rep. 4, 5

(*e*) See p. 224, *ante*.

(*f*) See *Tyson* v. *Smith* (1838), 9 Ad. & El. 406, Ex. Ch., *per* TINDAL, C.J., at p. 422.

(*g*) *Lockwood* v. *Wood*, *supra*.

(*h*) See *Simpson* v. *Wells* (1872), L. R. 7 Q. B. 214, where an alleged custom to erect stalls for the hiring of labourers at certain statutory sessions held under the Statutes of Labourers was defeated by showing that the first of these statutes was passed in the reign of Edward III.

SECT. 1. Creation and Origin.

holding that a possible origin for an alleged custom is not a necessity. This can, however, probably be traced to the similarity which a claim by custom bears to a claim by prescription, and to the fact that in the latter case it is essential that the possibility of a legal origin be proved (*i*).

Proof of user.

**442.** The length of time during which user or enjoyment of rights alleged to exist by custom, that is to say, the existence of the custom, must be shown depends upon the circumstances of each case; but as a general rule proof of the existence of the custom, as far back as living witnesses can remember, is treated, in the absence of any sufficient rebutting evidence, as proving the existence of the custom from time immemorial (*k*). Evidence of the existence of an alleged custom for a period of twenty years may be sufficient to warrant the court in finding as a fact the existence of the custom from time immemorial (*l*).

### SECT. 2.—*Enjoyment.*

Enjoyment.

**443.** The enjoyment of a right claimed to exist under an alleged custom must be enjoyment "as of right" in order that such enjoyment may support the claim (*m*); that is to say, all acts which it is alleged were committed under and by virtue of the custom in order to establish the custom must have been done without violence, without stealth or secrecy, and without leave or licence asked for and given, either expressly or impliedly, from time to time (*n*).

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(*i*) *Mills* v. *Colchester Corporation* (1867), L. R. 2 C. P. 476, *per* WILLES, J., at p. 487: "We are well convinced of the convenience and the justice of upholding ancient custom when it could have had a legal origin. We are aware that where such origin can be assigned it is not for us to argue upon the particular reasons for the custom"; *Bryant* v. *Foot* (1867), 7 B. & S. 725, *per* BLACKBURN, J., at p. 740; *Elwood* v. *Bullock* (1844), 6 Q. B. 383, *per* Lord DENMAN, C.J., at p. 411; *London and North Western Rail. Co.* v. *Fobbing Levels Sewers Commissioners* (1896), 75 L. T. 629; *Edwards* v. *Jenkins*, [1896] 1 Ch. 308, *per* KEKEWICH, J., at p. 312; *Fitch* v. *Rawling* (1795), 2 Hy. Bl. 394, *per* HEATH, J., at p. 399.

(*k*) See *Jenkins* v. *Harvey* (1835), 1 Cr. M. & R. 877, *per* PARKE, B., at p. 894; *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344, *per* JOYCE, J., at p. 350; *Hammerton* v. *Honey* (1876), 24 W. R. 603, *per* JESSEL, M.R., at p. 604; and p. 237, *post*. The periods during which living witnesses have been able to testify as to the existence of customs, and which have been held sufficient to raise the presumption of existence of the custom from time immemorial, have varied greatly in different cases. Thus, the testimony of witnesses extended over upwards of seventy years in *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A., and in *Jenkins* v. *Harvey* (1835), 1 Cr. M. & R. 877.

(*l*) *R.* v. *Joliffe* (1823), 2 B. & C. 54, *per* ABBOTT, C.J.: "A regular usage for twenty years, not explained or contradicted, is that upon which many public and private rights are held, there being nothing in the usage to contravene the public policy"; *Brocklebank* v. *Thompson*, *supra*, at p. 350.

(*m*) Co. Litt. 113 b: "Both to customs and prescriptions, these two things are incidents inseparable, viz., possession or usage, and time. Possession must have three qualities: it must be long, continual and peaceable." 1 Bl. Com. pp. 76, 77: "To make a particular custom good it must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting."

(*n*) *Mills* v. *Colchester Corporation*, *supra*, *per* WILLES, J., at p. 486.

If the acts of user or enjoyment relied on to support a claim under an alleged custom are acts done in pursuance of some licence, those acts will not support the claim. An alleged custom for a person or persons to obtain a licence to do some act admits the necessity of obtaining such a licence: this shows that the alleged custom is founded on a long series of acts which were only enjoyed precariously, and not as of right: consequently the user will not support the alleged custom (*o*).

Interruption.

**444.** It is not essential that the user or enjoyment of a right be a continuous enjoyment without interruption, for any amount of non-user will not of itself extinguish a custom which actually exists (*p*). The effect of non-user, as against persons seeking to establish an alleged custom, is to raise a strong presumption that there never was such a custom as that alleged; for where the enjoyment of alleged rights has been interrupted and the interruption acquiesced in for a great number of years by those interested in upholding those rights, there is a strong presumption that those rights were never enforceable (*q*). The same considerations do not, however, apply when it can be shown that the non-user was accidental or due to natural causes (*r*).

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See also *Montgomerie & Co., Ltd.* v. *Wallace-James*, [1904] A. C. 73, at pp. 81, 82.

(*o*) *Mills* v. *Colchester Corporation* (1867), L. R. 2 C. P. 476, where a custom was alleged that a corporation of an ancient borough had of right held yearly courts, and at such courts granted a licence to dredge oysters in a fishery for the ensuing oyster season to every oyster dredger inhabiting the borough who had served an apprenticeship of seven years to any oyster dredger licensed by the corporation. The custom was not established.

The principle in the text is distinguishable from that which admits of customs existing, whereby persons are entitled to do certain acts in consideration of making some payment for the privilege. See, for instance, *Tyson* v. *Smith* (1838), 9 Ad. & El. 406, Ex. Ch., where a custom to enter the land of another at certain times, and to erect booths upon it, paying a certain sum to the owner of the soil, was held good; *Elwood* v. *Bullock* (1844), 6 Q. B. 383 (a similar custom, subject to the payment of a reasonable compensation to the owner of the soil). The principle refers to the acts of enjoyment by which it is sought to establish the existence of a custom; the cases last cited are instances where the custom itself, as distinguished from the acts of enjoyment, involves a mutuality of benefit.

(*p*) See *Scales* v. *Key* (1840), 11 Ad. & El. 819, where a custom was held to exist in 1834, although no exercise of a right under it had been shown since 1689. Lord DENMAN, C.J., said, at p. 825: "The finding of the jury, that the custom had existed till 1689, was the same in effect as if they had found that it had existed till last week, unless something appeared to show that it had been legally abolished." See also 1 Bl. Com. 77: "An interruption of the possession only for ten or twenty years will not destroy the custom; it only becomes more difficult to prove." Co. Lit. 114 b: "As to by what means a title by custom may be lost by interruption. It is to be known that the title, being once gained by custom, cannot be lost by interruption of the possession for ten or twenty years, but by interruption in the right."

(*q*) See *Hammerton* v. *Honey* (1876), 24 W. R. 603; *per* JESSEL, M.R. See p. 232, *ante*.

(*r*) See *Mercer* v. *Denne*, [1904] 2 Ch. 534, affirmed, [1905] 2 Ch. 538, C. A.; where the land claimed to be affected by an alleged custom had for many years been covered by the sea. FARWELL, J., said, at p. 556: "The mere non-user during the period that the sea flowed over the spot is immaterial, for it was no interruption of the right, but only of the possession."

SECT. 2. Enjoyment.

Modification of rights.

**445.** The nature of the right enjoyed, and also the extent of the land over which it is exercised, are capable of reasonable modification and extension. Thus, in the case of a custom to carry on a trade, the nature of the trade may vary with the advent of improved methods, or, in the case of a custom to play games on a close of land, the nature of the games played may vary with the prevailing fashion (*s*).

Accretion of territory.

So, also, where land is gradually added to other land which is subject to a particular custom, as by the gradual retrocession of the sea, the land thus added becomes subject to the custom to which the other land is subject, notwithstanding that this accretion, or part of it, has taken place since the commencement of legal memory (*t*). The accretion will be treated as if it had occurred before 1189 (*a*).

### SECT. 3.—*Proof.*

Proof of custom.

**446.** All customs of which the courts do not take judicial notice must be clearly proved to exist—the onus of establishing them being upon the parties relying upon their existence (*b*). Evidence to prove a custom must not only be consistent with the custom which is alleged, but must also prove a custom which is no wider than that alleged. If the evidence tends to prove a custom wider than that which is alleged, the party seeking to establish the custom is not at liberty to adopt part only of the evidence and to reject the rest (*c*).

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(*s*) *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A., at p. 581; *London Corporation* v. *Vanacre* (1700), 12 Mod. Rep. 270, where HOLT, J., said, at p. 271: "General customs may be extended to new things which are within the reason of those customs"; *Snelling's Case* (1595), 5 Co. Rep. 82, 83, where a custom of London that the executor of a citizen could be sued for the debt of the citizen after his decease was held to extend to the administrator although no action could be brought against administrators before stat. (1357) 31 Edw. c. 3, c. 11; and see *Dyce* v. *Hay* (1852), 1 Macq. 305, 312, H. L.; and *London and North Western Rail. Co.* v. *Fobbing Levels Sewers Commissioners* (1896), 75 L. T. 629, at p. 632, where it was held no answer to an allegation of a custom to repair sea walls that the particular walls had not been built for more than thirty or forty years as the custom to keep up some sort of defence against the sea may have existed before, and p. 242, *post*.

(*t*) *Mercer* v. *Denne*, [1904] 2 Ch. 534, a case where a custom was alleged for fishermen to dry their nets on certain land which was shown to have been formed by the gradual retirement of the sea. FARWELL, J., after referring to the judgment of Lord CHELMSFORD in *A.-G.* v. *Chambers* (1859), 4 De G. & J. 55, said, at p. 559: "This reasoning applies with equal force to the persons entitled to exercise rights over a piece of land adjoining the sea. If it is washed away, their rights are gone. If it increases their rights ought to extend over the increased area. It is said that it would be absurd to apply this to a case where the sea has receded for a mile or more; but this is not the case. If there was now a mile or more of such accretion, it would hardly be possible to find evidence of actual user, over more than the fringe near the sea, and the extent of the custom could be limited by such user; or, even if any such user could be shown, the landowner's right of free enjoyment would only be limited by a reasonable exercise of customary rights, and it would probably be held unreasonable to insist on drying nets over a large tract of land."

(*a*) *Mercer* v. *Denne*, *supra*, *per* FARWELL, J., at p. 559.

(*b*) *Moult* v. *Halliday*, [1898] 1 Q. B. 125, *per* CHANNELL, J., at p. 129.

(*c*) *Hammerton* v. *Honey* (1876), 24 W. R. 603, *per* JESSEL, M.R., at p. 604. See *Farquhar* v. *Newbury Rural Council*, [1909] 1 Ch. 12, C. A.; and p. 228, *ante*.

Usual method.

**447.** In proving an immemorial custom, the usual course taken is to call persons of middle or old age to state that in their time, usually at least half a century, the custom has always prevailed (*d*). This is considered, in the absence of countervailing evidence, to show that the custom has existed from all time. There are two sorts of countervailing evidence. First, other old persons may be called to show that there was an interruption during the period spoken of by the first set of witnesses; secondly, evidence may be given that, from the nature of the case, it was quite impossible that such a right should have existed from time immemorial, or that there is some legal difficulty or obstacle in the way which makes the alleged assertion of the right incompatible with the law of the country (*e*). Whether the evidence supports the custom as alleged or not is a question of fact for the jury, or, if the court is exercising the functions of a jury, for the court (*f*). A custom possible in law, being reasonable and otherwise fulfilling the requisites of a good custom, may be established by very slender evidence (*g*).

Judicial notice.

**448.** The court will take judicial notice of local customs of descent (*h*), and of the customs of the City of London when they

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(*d*) *Hammerton* v. *Honey* (1876), 24 W. R. 603; see also *Lanchbury* v. *Bode*, [1898] 2 Ch. 120, *per* KEKEWICH, J., at p. 125.

(*e*) *Hammerton* v. *Honey*, *supra*, *per* JESSEL, M.R., at p. 604; see also *Mercer* v. *Denne*, [1904] 2 Ch. 534, *per* FARWELL, J., at pp. 555, 556; *Bastard* v. *Smith* (1837), 2 Mood. & R. 129, *per* TINDAL, C.J., at p. 136.

For the methods of proving customs, and the relative values of the sources of proof, see the following cases:—*R.* v. *Joliffe* (1823), 2 B. & C. 54 (custom for the steward of a court leet to nominate certain persons to the bailiff, to be summoned on the jury. The defendant proved that for more than twenty years the precept to the bailiff had always contained a list of persons whom the steward directed him to summon as jurors. No evidence was given for the Crown to show that any other practice had ever prevailed in the borough. The court held that slight evidence, if uncontradicted, was cogent evidence); *Bastard* v. *Smith*, *supra*; *Bremner* v. *Hull* (1866), L. R. 1 C. P. 748 (a custom as to the appointment of churchwardens); *Hammerton* v. *Honey*, *supra*, where an alleged custom for the inhabitants of a hamlet to use a green for the purposes of recreation and amusement was held not proved; it was admitted that after twenty years of disuse of the alleged custom, the strictest possible evidence of the custom must be adduced; *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344, where a customary churchway in favour of the inhabitants of a parish was held proved upon evidence which failed to prove a similar manorial custom; *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.; *Ramsgate Corporation* v. *Debling* (1906), 22 T. L. R. 369, where an alleged custom for the inhabitants of Ramsgate to place chairs on the seashore was held not proved; *Hough* v. *Clark* (1907), 23 T. L. R. 682, p. 683; *Fitzhardinge* (*Lord*) v. *Purcell*, [1908] 2 Ch. 139; *Farquhar* v. *Newbury Rural Council*, [1909] 1 Ch. 12, C. A.

(*f*) *Bremner* v. *Hull*, *supra*, at p. 758.

(*g*) *Johnson* v. *Clark*, [1908] 1 Ch. 303, *per* PARKER, J., at p. 309.

(*h*) *Re Chenoweth*, [1902] 2 Ch. 488 (the custom of gavelkind); 1 Bl. Com. 76; *Clements* v. *Scudamore* (1704), 2 Ld. Raym. 1024 (the custom of Borough English), *per* HOLT, C.J., at pp. 1025, 1026: "The common law takes notice of these customs of Gavelkind and Borough English"; *Crosby* v. *Hetherington* (1842), 4 Man. & G. 933; *Rider* v. *Wood* (1855), 24 L. J. (CH.) 737, where it was held that if the custom is alleged to be according to the tenure of Borough English, the court will take judicial notice of all the incidents of this custom, but if the incidents of the custom only are alleged, the court will not go beyond the allegations; *Payne* v. *Barker* (1662), O. Bridg. 18, cited in *Rider* v. *Wood*, *supra*, at p. 741.

SECT. 3. Proof.

have been certified by the City Recorder (*i*); but alleged customs of the City which have not been so certified must be strictly proved (*k*).

# Part III.—Customary Rights in Alieno Solo.

## SECT. 1.—*In General.*

Rights *in alieno solo.*

**449.** Rights may exist by custom which may affect the ownership of land and which may be enjoyed by persons having no estate or interest in the land (*l*). Such rights partake of the nature of easements, and are in effect *quasi*-easements (*m*). They are not easements proper, inasmuch as they are generally enjoyed by classes of persons the members of which are continually changing and are continually fluctuating in number, so that they could not *eo nomine* take a grant of such rights; for unless rights *in alieno solo* be such that they are capable of being granted to and released by the persons enjoying them, they do not amount to easements (*n*).

In order that a right *in alieno solo* (amounting to a *quasi*-easement) claimed to exist under an alleged custom in favour of an undefined and fluctuating body of persons may be valid and enforceable, it must be certain (*o*) and reasonable (*p*), and generally conform to the requirements of customs already referred to (*q*).

## SECT. 2.—*Profits à prendre.*

*Profits à prendre.*

**450.** If a right *in alieno solo* amount to a *profit à prendre* it cannot be claimed under an alleged custom; for no *profit à prendre* can

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(*i*) *Chace* v. *Box* (1700), 1 Ld. Raym. 484; *Crosby* v. *Hetherington* (1842), 4 Man. & G. 933; *Bruin* v. *Knott* (1843), 12 Sim. 436, at pp. 453 *et seq.*; *Blacquiere* v. *Hawkins* (1780), 1 Doug. (K. B.) 378.

(*k*) *Stanton* v. *Jones* (1779), 1 Doug. (K. B.) 380, n., *per* Lord MANSFIELD. See also Pulling, Customs of the City of London.

(*l*) Thus the inhabitants of a vill may have a right by custom to dance upon a particular close belonging to an individual (*Abbot* v. *Weekly* (1665), 1 Lev. 176); the inhabitants of a township may under a custom enjoy a right to enter another's land and take water from a spring (*Race* v. *Ward* (1855) 4 E. & B. 702); the fisherman inhabitants of a parish may have a customary right of spreading and drying their nets on the land of a private owner (*Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.); persons carrying on the trade of victuallers may by custom erect booths on another's land at the time of a particular fair (*Tyson* v. *Smith* (1838), 9 Ad. & El. 406, Ex. Ch.); the freemen of a city may enjoy a custom entitling them to hold horse-races on land belonging to a private individual (*Mounsey* v. *Ismay* (1865), 3 H. & C. 486); the inhabitants of a parish may erect a maypole and dance round it on the land of a private owner (*Hall* v. *Nottingham* (1875) 1 Ex. D. 1); and see *Batten* v. *Gedye* (1889), 41 Ch. D. 507, and *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344 (cases relating to parishioners' rights of way to a parish church).

(*m*) *Brocklebank* v. *Thompson*, *supra*, *per* JOYCE, J., at p. 348; *Constable* v. *Nicholson* (1863), 14 C. B. (N. S.) 230, *per* WILLES, J., at p. 240.

(*n*) See title EASEMENTS AND PROFITS À PRENDRE.

(*o*) *Broadbent* v. *Wilks* (1742), Willes, 360; *Carlyon* v. *Lovering* (1857), 1 H. & N. 784, at p. 800.

(*p*) *Broadbent* v. *Wilks*, *supra*; *Rogers* v. *Taylor* (1857), 1 H. & N. 706.

(*q*) *Carlyon* v. *Lovering*, *supra*, *per* WATSON, B., at p. 800.

be claimed by custom (*r*); nor can there be a right to a *profit à prendre* in an undefined and fluctuating body of persons (*s*).

The foregoing proposition that rights *in alieno solo* cannot be claimed by custom is subject to a very important exception in the case of the rights of commoners, copyhold tenants and other tenants of manors, to rights of common and other manorial rights (*a*).

Fluctuating bodies.

**451.** The chief reason why a *profit à prendre* cannot be supported by custom in favour of an indefinite and fluctuating body of persons is, that were such a right recognised the result would be that the subject-matter of the right would soon become exhausted (*b*);

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(*r*) *Grimstead* v. *Marlowe* (1792), 4 Term Rep. 717 (an alleged custom for the inhabitants of a parish to have common of pasture), *per* Lord KENYON, C.J., at p. 718: "There may be a custom for an easement, as a right of way *in alieno solo;* but for a *profit à prendre*, the party must prescribe in a *que estate*"; *Hardy* v. *Hollyday* (1765), cited by BULLER, J., in *Grimstead* v. *Marlowe*, *supra*, at p. 718; *Davies' Case* (1688), 3 Mod. Rep. 246, where it was held there could not be a custom for tenants of a manor to fowl in the warren of another, fowling being a *profit à prendre; Gateward's Case* (1607), 6 Co. Rep. 59 b; *Rockey* v. *Huggens* (1631), Cro. Car. 220; *Race* v. *Ward* (1855), 4 E. & B. 702 (a claim by custom of a right to take water from a spring), *per* Lord CAMPBELL, C.J., at p. 709: "This is no part of the soil, like sand, or clay, or stones; nor the produce of the soil, like grass, or turves, or trees. A right to take these by custom, claimed by all the inhabitants of a district, would clearly be bad; for they all come under the category of *profit à prendre*, being part of the soil or the produce of the soil; and such a claim, which might leave nothing for the owner of the soil, is wholly inconsistent with the right of property in the soil"; *A.-G.* v. *Mathias* (1858), 4 K. & J. 579, *per* BYLES, J., at pp. 590, 591; *City of London Commissioners of Sewers* v. *Glasse* (1872), 7 Ch. App. 456, *per* JAMES, L.J., at p. 465; *Allgood* v. *Gibson* (1876), 34 L. T. 883, at p. 884; *Blewett* v. *Tregonning* (1835), 3 Ad. & El. 554, *per* PATTESON, J., at p. 575; *Brand* v. *Lipscombe* (1854), 4 E. & B. 713, n; *Pitts* v. *Kingsbridge Highway Board* (1871), 19 W. R. 884; *Lloyd* v. *Jones* (1848), 6 C. B. 81 (an alleged custom to take fish from a river), *per* WILDE, C.J., at p. 89; *Constable* v. *Nicholson* (1863), 14 C. B. (N. S.) 230, at pp. 239, 240, 242; *Chilton* v. *London Corporation* (1878), 7 Ch. D. 735, where an alleged custom for the inhabitants of a parish to lop branches of trees growing on the waste lands of a manor was held bad; *De la Warr (Earl)* v. *Miles* (1881), 17 Ch. D. 535, C. A., at p. 577; *Tilbury* v. *Sylva* (1890), 45 Ch. D. 98, C. A., at p. 107; *Fitzhardinge (Lord)* v. *Purcell*, [1908] 2 Ch. 139, at p. 163; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, where a claim of right in the free inhabitants of a certain borough to fish for oysters was upheld as arising from a trust declared as a condition of a grant of a several fishery to the corporation; Lord CAIRNS at p. 648 expressly declined to base the right upon custom, saying: "I think it to be clear law that while you may by custom claim an easement to be enjoyed over the land of another, you cannot by custom claim a *profit à prendre in alieno solo*"; see also *Chesterfield* v. *Fountaine* (1895), cited [1908] 1 Ch. 243, n. And see title EASEMENTS AND PROFITS À PRENDRE.

(*s*) *City of London Commissioners of Sewers* v. *Glasse*, *supra*, *per* JAMES, L.J., at p. 465: "Of course it is settled and clear law that you cannot have any right to a *profit à prendre in alieno solo* in a shifting body like the inhabitants of a town or residents of a particular district."

(*a*) See *Hardy* v. *Hollyday* (1765), cited by BULLER, J., in *Grimstead* v. *Marlowe*, *supra*, at pp. 718, 719, where it is said that where a profit is to be claimed out of another man's soil, it must be alleged by way of prescription and not by custom, unless in the case of a copyhold tenant against his lord. Manorial customs and rights of common are not dealt with under this heading. For rights of this kind see titles COMMONS, Vol. IV., p. 441; COPYHOLDS, Vol. VIII., p. 3.

(*b*) *Race* v. *Ward*, *supra*, *per* Lord CAMPBELL, C.J., at p. 705.

SECT. 2. Profits à prendre.

and the owner of the land subject to the right would be wholly deprived of the ordinary incidents of ownership (*c*). For no release could ever be obtained of the rights from such bodies of persons, inasmuch as they would be incapable, from their very nature, of granting a release; and the land would continue subject to an unreasonable burden in perpetuity (*d*). Moreover, the number of persons composing such a body as the inhabitants of a particular district might increase to any extent, and thus soon cause the destruction of the subject-matter of the custom (*e*). Upon this principle any alleged custom whereby a right is claimed to take and carry away any portion of the soil (*f*), or to take anything in the nature of the fruit of the soil from the land of another person, is held to be void (*g*).

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(*c*) As to rights to take a *profit à prendre* in favour of undefined and fluctuating bodies of persons, under the doctrine of a presumed or actual grant from the Crown, see *Willingale* v. *Maitland* (1866), L. R. 3 Eq. 103; *Chilton* v. *London Corporation* (1878), 7 Ch. D. 735, *per* JESSEL, M.R., at p. 743; *Rivers* (*Lord*) v. *Adams* (1878), 3 Ex. D. 361, *per* KELLY, C.B., at p. 365. As to rights of this kind in favour of such persons as members of a presumed or actual corporation, see *Re Free Fishermen of Faversham Company* (1887), 36 Ch. D. 329, C. A.; *Mellor* v. *Spateman* (1669), 1 Wms. Saund. 343, at p. 346 a; *Parry* v. *Thomas* (1850), 5 Exch. 37; *Beadsworth* v. *Torkington* (1841), 1 Q. B. 782. As to rights of this kind being supported under a presumed charitable trust, see *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633.

(*d*) *A.-G.* v. *Mathias* (1858), 4 K & J. 579, *per* BYLES, J., at p. 591: "It is an elementary rule of law that a *profit à prendre* in another's soil cannot be claimed by custom, for this, among other reasons, that a man's soil might thus be subject to the most grievous burdens in favour of successive multitudes of persons like the inhabitants of a parish or other district, who could not release the right." For other reasons for the rule in the text, see *Gateward's Case* (1607), 6 Co. Rep. 59 b, at 60 a; *Rivers* (*Lord*) v. *Adams*, *supra*, *per* KELLY, C.B., at p. 364.

(*e*) *Rivers* (*Lord*) v. *Adams*, *supra*. KELLY, C.B., said: "It might also be added in relation to such a right as is claimed in the present case that mere inhabitancy is capable of an increase almost indefinite, and if the right existed in a body which might be increased to any number, it would necessarily lead to the destruction of the subject-matter of the custom. There cannot therefore be such a custom"; and see *Fitzhardinge* (*Lord*) v. *Purcell*, [1908] 2 Ch. 139, *per* PARKER, J., at p. 163; *Davies' Case* (1688), 3 Mod. Rep. 246.

(*f*) *Constable* v. *Nicholson* (1863), 14 C. B. (N. S.) 230, where claims by the inhabitants of a particular township and by the overseers of the highways of the township to a right of entering another person's land, being the seashore between high and low water mark, and of digging and carrying away gravel, sand, stones, cobbles, ballast, seaweed, and other materials for repairing the highways in the township failed, on the ground that, so far as the pleas were capable of being construed as justifying under a custom, such custom would be void, being a claim to a *profit à prendre in alieno solo*. See also *Blewett* v. *Tregonning* (1835), 3 Ad. & El. 554 (alleged custom bestowing a right to enter another's land and to take and carry away sand which had been drifted on to the land by the wind held bad on the ground that the drifted sand was indistinguishable from the soil); *Pitts* v. *Kingsbridge Highway Board* (1871), 19 W. R. 884 (alleged custom for the inhabitants of a parish to take shingle from the property of a private owner in order to repair the highways of the parish held bad as amounting to a *profit à prendre in alieno solo*); *Hough* v. *Clark* (1907), 23 T. L. R. 682 (alleged custom in a parish for inhabitants to dredge and take gravel and sand for public and private use in the parish from the bed of a river); *City of London Commissioners of Sewers* v. *Glasse* (1872), 7 Ch. App. 456, *per* JAMES, L.J., at p. 465.

(*g*) *Rivers* (*Lord*) v. *Adams*, *supra* (a claim by the inhabitants of a parish

An alleged custom which would destroy the subject-matter of the right would be unreasonable; and since no unreasonable custom can exist, such a right would be void (*h*).

## SECT. 3.—*Rights of Recreation.*

Rights of recreation.

**452.** A large proportion of the rights existing by custom *in alieno solo* are rights of entering another person's land and of using it for the purposes of recreation. Such rights may be claimed by custom by all the inhabitants of a parish (*i*), township (*j*), town (*k*), vill (*l*), or manor (*m*), or by the freemen of a city (*n*). But a right to enter another's land for the purposes of recreation under an alleged custom can only exist if it be in favour of a particular class of persons. Such a right cannot exist by custom in favour of the public in general (*o*), nor in favour of all persons who for the time being happen to be in a particular district (*p*).

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of a right by custom to cut and take fagots or baskets of the underwood growing upon another's land); *Chilton* v. *London Corporation* (1878), 7 Ch. D. 735 (an alleged custom for the inhabitants of a parish within the ambit of a manor to cut and lop the boughs and branches of the trees growing upon the waste lands of a forest in the ambit of the manor, for use as fuel). Compare, however, *Bond's Case* (1639), March, 16, cited in *Constable* v. *Nicholson* (1863), 14 C. B. (N. S.) 230, at p. 236 (where a custom was said to be good to take rushes to strew the floor of a church); WILLES, J., in *Constable* v. *Nicholson*, *supra*, at p. 237, said that the decision was not considered satisfactory even at that time. See also *Bailey* v. *Stephens* (1862), 12 C. B. (N. S.) 91; and p. 226, *ante*.

(*h*) *Chesterfield* v. *Fountaine* (1895), *per* WILLS, J., cited [1908] 1 Ch. 243, n.

(*i*) *Fitch* v. *Rawling* (1795), 2 Hy. Bl. 393 (a custom for all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes in a particular close belonging to a private owner at all seasonable times of the year at their free will and pleasure); *Hall* v. *Nottingham* (1875), 1 Ex. D. 1 (a custom for the inhabitants of a parish to enter upon certain land and to erect a maypole thereon, and dance round it and otherwise enjoy any lawful and innocent recreation at any time in the year on the land); and see *Warrick* v. *Queen's College, Oxford* (1870), L. R. 10 Eq. 105, at p. 129.

(*j*) *Race* v. *Ward* (1855), 4 E. & B. 702.

(*k*) *Abercromby* v. *Fermoy Town Commissioners*, [1900] 1 I. R. 302; and see *Millechamp* v. *Johnson* (1746), Willes, 205, n. (b), in which case, however, the particular custom was held bad; but this was upon the ground that the right which it was alleged to give, namely, a right for all the inhabitants of a particular town to enjoy the liberty of playing at any rural sports, was too general and uncertain.

(*l*) *Abbot* v. *Weekly* (1665), 1 Lev. 176 (a custom for the inhabitants of a vill to dance in a particular close at all times of the year at their free will for this recreation).

(*m*) *Coote* v. *Ford* (1900), 83 L. T. 482.

(*n*) *Mounsey* v. *Ismay* (1865), 3 H. & C. 486 (a custom for the freemen of Carlisle to enter and hold horse-races on the land of an individual owner).

(*o*) *Bourke* v. *Davis* (1889), 44 Ch. D. 110, where KAY, J., speaking of a right of recreation by custom, said, at p. 120: "Such a claim is known to our law, but is carefully restricted. It cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district"; see also *Coventry* (*Earl*) v. *Willes* (1863), 12 W. R. 127, *per* COCKBURN, C.J., at p. 128 (ineffectual claim of a customary right for the public to enter Newmarket Heath at their free will and pleasure and to remain there a reasonable time for the purpose of witnessing horse-races).

(*p*) *Fitch* v. *Rawling* (1795), 2 Hy. Bl. 393, where a plea of an alleged custom for all persons for the time being, being in the parish, to have the liberty and

SECT. 3. Rights of Recreation.

Modern forms of recreation.

**453.** When a right of recreation by exercising and playing at games, sports, and pastimes exists under a custom in favour of the inhabitants of a particular district, or in favour of some other class of persons, this right is not confined to the kinds of games, sports, pastimes, and recreations existing at the commencement of legal memory, namely, 1189 (*q*). Thus, a right for all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes, on another's land at all seasonable times of the year will justify an inhabitant playing cricket on the land (*r*), although it is reasonably certain that cricket was unknown until long after the time of Richard I. (*s*). The question what is a seasonable time in such a case depends on the manner in which the exercise of the right will affect the owner of the soil. Thus, a custom for all the inhabitants of a town to walk and ride over a close of arable land at all seasonable times of the year will not justify any member of this class in exercising such a privilege while the corn is growing on the land (*t*); for a seasonable time does not mean any time convenient to the person using the right, so as to extend to every period of good weather when it would be seasonable to ride out for the purposes of health (*a*). It seems that a right of boating on a river for the purposes of recreation might be claimed by custom (*b*).

### SECT. 4.—*Right to Water.*

Right of taking water.

**454.** A right may exist by custom whereby the persons who enjoy the right are entitled to enter upon the land of another person and to take water from the land (*c*). Such a right may be enjoyed by fluctuating and undefined classes of persons like the inhabitants of a parish (*d*), township (*e*), district (*f*), or of any particular place (*g*), and may bestow a right of taking water lying upon the land (*h*), water issuing from a well or spring upon the

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privilege of exercising and playing at all kinds of lawful games in and upon the *locus in quo* at all seasonable times was held bad.

(*q*) *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.

(*r*) *Fitch* v. *Rawling* (1795), 2 Hy. Bl. 393.

(*s*) *Mercer* v. *Denne*, [1904] 2 Ch. 534, *per* FARWELL, J., at p. 553, and on appeal, [1905] 2 Ch. 538, at p. 581.

(*t*) *Bell* v. *Wardell* (1740), Willes, 202.

(*a*) *Ibid.*, *per* WILLES, C.J., at p. 205.

(*b*) See the suggestion made by KAY, J., in *Bourke* v. *Davis* (1889), 44 Ch. D. 110, at p. 120, where, however, no such custom was claimed.

(*c*) *Race* v. *Ward* (1855), 4 E. & B. 702 (a custom for all the inhabitants of a township to take water from a well for domestic purposes); *Manning* v. *Wasdale* (1836), 5 Ad. & El. 758, *per* PATTESON, J., at p. 764 (a right to water cattle and take water for culinary and other domestic purposes).

(*d*) *Manning* v. *Wasdale*, *supra*.

(*e*) *Race* v. *Ward*, *supra*.

(*f*) *Harrop* v. *Hirst* (1868), L. R. 4 Exch. 43 (the district of Tamewater in the parish of Saddleworth, in the West Riding of York).

(*g*) *Smith* v. *Archibald* (1880), 5 App. Cas. 489, *per* Lord BLACKBURN, at pp. 512, 513 (a claim by the inhabitants of a village, which was not a separate borough or parish, to draw water from a well).

(*h*) *Manning* v. *Wasdale*, *supra*; see, also, *Boteler* v. *Bristow* (1475), Y. B. 15 Edw. 4, fol. 29, A, pl. 7, cited in *Race* v. *Ward* (1855), 4 E. & B. 702,

land (*i*), water falling from a spout (*k*), or water flowing over the land (*l*), or even water falling from a spout in a public highway (*m*). The right to take water from the land of another person, whether the water be issuing from the land or be lying on it or flowing over it, is not regarded as a product of the soil or part of the soil; and for this reason the right is not a right to a *profit à prendre*, which cannot be claimed by custom (*n*), nor is it a right of property (*o*), but is in the nature of an easement (*p*).

In most, if not all, of the reported cases dealing with this right the water taken from the land of another person under a custom has been water required and utilised for some particular purpose and in a particular manner (*q*); but as the right is in the nature of an easement and not a *profit à prendre* there seems to be no necessity that it should be so limited (*r*).

## SECT. 5.—*Rights of Way.*

Rights of way.

**455.** A right of way may exist over the land of another by virtue of a custom. Rights of way existing by custom are to be distinguished both from public rights of way, or highways (*s*), which arise from the dedication of the soil by its owners to the use of

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at p. 710. The note (a) to p. 710 in the report of the last-mentioned case, however, throws doubt upon the authenticity of *Boteler* v. *Bristow* as an authority. Moreover, the word in the original Norman-French is "fount" (see p. 706, which seems to classify this case as an example under note (*k*), *post*).

(*i*) See, for instance, *Race* v. *Ward*, *supra* (a custom to take water from a spring or well upon a certain close belonging to an individual owner).

(*k*) *Harrop* v. *Hirst* (1868), L. R. 4 Exch. 43 (a customary right for the inhabitants of a district to take water from a spout); and see note (*h*), *supra*.

(*l*) *Gaved* v. *Martin* (1865), 19 C. B. (N. S.) 732 (the right of tin bounders in Cornwall to take water flowing over their tin bounds).

(*m*) *Harrop* v. *Hirst*, *supra*.

(*n*) See p. 238, *ante*.

(*o*) *Smith* v. *Archibald* (1880), 5 App. Cas. 489, *per* Lord BLACKBURN, at p. 512; compare *Weekly* v. *Wildman* (1698), 1 Ld. Raym. 405, where BLENCOWE, J., at p. 407, said: "Inhabitants may have a custom to have pot water, which is an interest, and not barely an easement."

(*p*) *Manning* v. *Wasdale* (1836), 5 Ad. & El. 758, *per* Lord DENMAN, C.J., at p. 763: "It is not consistent with ordinary language to call the taking of water a *profit à prendre;* and *per* PATTESON and WILLIAMS, JJ., at p. 764; and see *Race* v. *Ward*, *supra*.

(*q*) Thus in *Manning* v. *Wasdale*, *supra*, the water was for "culinary and other domestic purposes"; and for "washing and watering cattle"; in *Race* v. *Ward*, *supra*, the water was to be consumed in the inhabitants' dwelling-houses, and the pleas were amended upon the argument by inserting the words "for domestic purposes"; in *Harrop* v. *Hirst*, *supra*, the water was "for culinary and other domestic purposes to be used in" the inhabitants' dwelling-houses, "for the more convenient use and occupation thereof"; in *Boteler* v. *Bristow* (1475), Y. B. 15 Edw. 4, fol. 29, A, pl. 7, the water was "*pur faire manger et boyer et touts necessaries*"; in some of the older cases the water was said to be for the purposes of "pot water"; see *Weekly* v. *Wildman*, *supra*, *per* BLENCOWE, J., at p. 407.

(*r*) *Smith* v. *Archibald*, *supra*, *per* Lord BLACKBURN, at p. 512, in which case no special purposes were defined for which the water was to be used. See, generally, as to water rights, titles EASEMENTS AND PROFITS À PRENDRE; WATERS AND WATERCOURSES; WATER SUPPLY.

(*s*) See title HIGHWAYS, STREETS AND BRIDGES.

SECT. 5. Rights of Way.

the public, and from private rights of way which are easements properly so-called (*t*). A customary right of way is one which may be enjoyed by any member of an undefined and fluctuating body or class of persons (*u*). It is regarded as a private right of way in so much as it exists only for the benefit of a limited section of the public, and it cannot be used under a claim of right by any person who is not a member of that body or class in whose favour it exists (*x*). Rights of way of this kind may exist in favour of the inhabitants of a parish (*y*) or a town (*a*), or probably of any other district sufficiently well defined to be the local area of any customary right (*b*).

Churchways.

**456.** *Quasi*-easements existing by custom in favour of undefined and fluctuating bodies of persons generally take the form of rights of way, either simply (*c*) or in conjunction with some other ancillary right (*d*). A customary churchway is a *quasi*-easement of this description (*e*). This is a right of way in favour of the parishioners to go to and from the parish church over the land of a private individual owner, and is enjoyed by the parishioners as a means of access to the parish church. Such a way can only exist by custom, and no landowner can dedicate a road with only such rights as the public would have over a churchway (*f*). It arises from user from time immemorial and cannot now be created anew (*g*). A right of way to a parish church, however, is not necessarily a customary right of way belonging to the parishioners,

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(*t*) As to private rights of way, see title EASEMENTS AND PROFITS À PRENDRE.

(*u*) *Grimstead* v. *Marlowe* (1792), 4 Term Rep. 717, *per* Lord KENYON, C.J., at p. 718; *Thrower's Case* (1672), 1 Vent. 208; *Batten* v. *Gedye* (1889), 41 Ch. D. 507; *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344; *Farquhar* v. *Newbury Rural Council*, [1909] 1 Ch. 12, C. A. See also *Gateward's Case* (1607), 6 Co. Rep. 59 b, at 60 b; Co. Litt. 110 b; see also *Goodday* v. *Michell* (1595), Cro. Eliz. 441; *Taylor* v. *Devey* (1837), 7 Ad. & El. 409; *Grant* v. *Kearney* (1823), 12 Price, 773 (cases of customary rights of perambulation).

(*x*) *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344, 348; *Austin's Case* (1672), 1 Vent. 189, where HALE, C.J., said: "If a way lead to a market, and were a way for all travellers, and did communicate with a great road etc. it is a highway; but if it lead only to a church, to a private house or village, or to fields, there it is a private way."

(*y*) *Brocklebank* v. *Thompson*, *supra*; *Batten* v. *Gedye*, *supra*.

(*a*) *Gateward's Case*, *supra*.

(*b*) See p. 230, *ante*.

(*c*) See, for instance, the cases cited in note (*e*), *infra*, as to customary churchways.

(*d*) *Race* v. *Ward* (1855), 4 E & B. 702, where there was a customary right of way to a spring, with the ancillary right of taking water from it. See also the cases cited in the next note.

(*e*) As to churchways of this kind, see *Thrower's Case*, *supra*; *Batten* v. *Gedye*, *supra*; *Brocklebank* v. *Thompson*, *supra*; *Farquhar* v. *Newbury Rural Council*, *supra*; Bac. Abr., 7th ed., Vol. IV., p. 215; Cru. Dig., 4th ed., Vol. III., p. 85; see also *Gateward's Case*, *supra*; *Walter* v. *Mountague* (1836), 1 Curt. 253; *Austin's Case*, *supra*; Co. Litt. 110 b.

(*f*) *Farquhar* v. *Newbury Rural Council*, *supra*, *per* COZENS-HARDY, M.R., at p. 16. See *Poole* v. *Huskinson* (1843), 11 M. & W. 827; and title HIGHWAYS, STREETS AND BRIDGES.

(*g*) *Farquhar* v. *Newbury Rural Council*, *supra*, *per* FLETCHER MOULTON, L.J., at p. 19.

but may be a public highway (*h*). *Primâ facie* a custom in reference to a way to a parish church is a parochial custom in favour of the parishioners; and a customary churchway not for the use and benefit of the parishioners at large would be rare (*i*).

Other instances of customary rights of way are connected with access to a market (*k*), or to common fields (*l*).

Obstruction.

**457.** An indictment will not lie for the obstruction of a right of way which exists by custom (*m*). But any one of the persons composing the body or class in whose favour the customary right exists may maintain an action for nuisance if the way be obstructed, without showing special damage (*n*).

Repair.

**458.** A customary right of way, not being a public right of way, is *primâ facie* repairable by the class or body of persons in whose favour such right exists (*o*).

Perambulations.

**459.** Rights incident to the perambulation of a district by inhabitants at certain times of the year for the purpose of preserving the notoriety of the boundaries of the district form a distinct class of customary rights of way (*p*). These rights of perambulation are peculiar in themselves, inasmuch as they are only exercised on rare occasions, sometimes only once a year (*q*) or once in many years (*r*). Like other customary rights they must be shown to have existed either actually or presumptively from time immemorial (*s*), and may exist in favour of the inhabitants of a parish (*t*),

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(*h*) See *Thrower's Case* (1672), 1 Vent. 208.

(*i*) *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344, at p. 354.

(*k*) *Gateward's Case* (1607), 6 Co. Rep. 59 b: "A custom that every inhabitant of a town shall have a way over land to a market is good"; see also Co. Litt. 110 b.

(*l*) *Austin's Case* (1672), 1 Vent. 189, *per* HALE, C.J.

(*m*) *Thrower's Case*, *supra*, where, speaking of a way to a church, HALE, C.J., said: "If this were alleged to be *communis via pedestris ad Ecclesiam pro parochianis* the indictment would not be good, for then the nuisance would extend no further than the parishioners, for which they have their particular suits"; the way in this case was, however, held to be a highway, and not a customary right of way.

(*n*) *Brocklebank* v. *Thompson*, *supra*, *per* JOYCE, J., at p. 348: "An indictment will not lie for the obstruction of a churchway, because it is in law a private and not a public way, and there are other distinctions, in particular that any one of the parishioners may have an action for nuisance therein without showing special damage."

(*o*) Thus in *Austin's Case*, *supra*, HALE, C.J., said: "If it be a public way of common right, the parish is to repair it, unless a particular person be obliged by prescription or custom. Private ways are to be repaired by the village or hamlet, or sometimes by a particular person."

(*p*) For instances of customary rights of way incident to perambulation, see *Goodday* v. *Michell* (1595), Cro. Eliz. 441; *Taylor* v. *Devey* (1837), 7 Ad. & El. 409.

(*q*) As, for instance, in *Goodday* v. *Michell*, *supra* (a customary right of perambulation by the parishioners in Rogation Week); *Grant* v. *Kearney* (1823), 12 Price, 773 (every Ascension Day).

(*r*) *Taylor* v. *Devey*, *supra* (Thursday in Rogation Week in every third year).

(*s*) *Grant* v. *Kearney*, *supra*, *per* HULLOCK, B., at p. 792.

(*t*) *Goodday* v. *Michell*, *supra*.

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manor (*a*), liberty (*b*), hundred (*c*), or other similar district. The right to perambulate parochial boundaries and to enter private property for that purpose, and to remove obstructions which might prevent this from being done, is a notorious custom in all parts of England (*d*). But a customary right to perambulate boundaries cannot confer a right to enter any house in the particular district the boundaries of which are being perambulated under a customary right, unless it be necessary to enter for any purpose connected with the perambulation (*e*).

Evidence sufficient to support an alleged customary right of way incident to a right of perambulating a parish will not necessarily support an alleged right of perambulating a liberty, for the boundaries of a parish and the boundaries of the liberty do not necessarily coincide (*f*).

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# Part IV.—Extinguishment of Custom.

Abolition of custom.

**460.** Custom, being in effect local common law within the locality where it exists, can only be abolished or extinguished in the same manner as other laws can be abolished, namely, by Act of Parliament (*g*). An Act of Parliament may abolish a custom either

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(*a*) *Chesterfield* (*Lord*) v. *Harris*, [1908] 2 Ch. 397, C. A.

(*b*) *Grant* v. *Kearney* (1823), 12 Price, 773 (a claim to perambulate the boundaries of the Liberty of the Rolls, and for that purpose to pass through the kitchen garden of Lincoln's Inn).

(*c*) *Chesterfield* (*Lord*) v. *Harris*, *supra*, at p. 407, where, however, COZENS-HARDY, M.R., said that a perambulation of a hundred is not usual, although he saw no reason why a hundred as well as a parish or a manor should not thus have its bounds ascertained.

(*d*) *Taylor* v. *Devey* (1837), 7 Ad. & El. 409, *per* Lord DENMAN, C.J., at p. 415.

(*e*) See *Taylor* v. *Devey*, *supra*, *per* Lord DENMAN, C.J., at p. 416. In this case a custom was alleged for the parishioners to enter and pass through a house in the parish when perambulating the boundaries of the parish; but it was not pleaded that the house was on the boundary or that it was necessary to pass through the house when following the boundary. Upon this ground the custom as pleaded was held invalid in law.

(*f*) *Grant* v. *Kearney* (1823), 12 Price, 773, at pp. 790, 795.

(*g*) *Hammerton* v. *Honey* (1876), 24 W. R. 603, *per* JESSEL, M.R., at p. 604; see also *Farquhar* v. *Newbury Rural Council*, [1909] 1 Ch. 12, C. A., where there was a way (which the plaintiff alleged was a customary churchway only in favour of the parishioners) over the plaintiff's land to an ancient parish church. A former owner had, some sixty years previously, diverted this way to a small extent, and had converted it into a well-formed carriage road. It was held by the Court of Appeal that the plaintiff's allegation could not be supported, inasmuch as the former owner could not be taken to have interfered with the customary way, except on the footing of enlarging such rights as formerly existed into a public highway; and see *Jermyn's Case* (1623), Cro. Jac. 670, which decided that a custom for a vestry to appoint a parish clerk could not be destroyed by a canon "that the parson of the church should have the placing of the clerk."

by express provision (*h*) or by the use of words which are inconsistent with the continued existence of the custom (*i*).

Effect of statutory enactments.

**461.** As a general rule, if the provisions of an Act of Parliament are repugnant to the continued existence of the custom, the custom will be treated as abrogated and destroyed, although the Act does not actually extinguish the custom by express words. And although the question whether the custom is destroyed or not has been said to turn on the question whether the statute is an affirmative or a negative statute (*j*), this distinction appears to be merely one of the factors to be considered in determining whether or not the statute is repugnant to the custom (*k*). As a corollary to this rule, no one

(*h*) For instances where customs have been extinguished by the express provisions of an Act of Parliament, see stat. (1693) 4 & 5 Will. & Mar. c. 2, and stat. (1703) 2 & 3 Ann. c. 5, abolishing certain customs in the province of York affecting testamentary dispositions; stat. (1724) 11 Geo. 1, c. 18, abolishing similar customs existing in the city of London; stat. (1695) 7 & 8 Will. 3, c. 38, abolishing similar customs in the principality of Wales; stat. (1856) 19 & 20 Vict. c. 94, abolishing customs in London and York as to distribution of intestates' property; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 247.

(*i*) Thus in *Salters' Co.* v. *Jay* (1842), 3 Q. B. 109, it was held that a custom of London which allowed a person to obstruct his neighbour's lights by building on an ancient foundation was abrogated by the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3, which enacts that when light has been enjoyed for twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding; *Truscott* v. *Merchant Tailors' Co.* (1856), 11 Exch. 855, Ex. Ch. (a decision to the same effect on the same custom); and see the judgment of WILLIAMS, J., at p. 865, where he says that he thought that if the enactment in question had stopped before it came to the *non obstante* clause, it would not have abrogated the custom of London; and see *Leicester Corporation* v. *Burgess* (1833), 5 B. & Ad. 246, where it was held that statutes for permitting the general sale of beer by retail in England did not supersede a custom of a borough prohibiting anyone from carrying on the trade of an alehouse-keeper in the borough who was not a burgess. The custom of London as to light is not wholly abolished by the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), but it is abolished merely for the purposes of s. 3 of the statute (*Perry* v. *Eames*, [1891] 1 Ch. 658, *per* CHITTY, J., at p. 667). See also *Lanchbury* v. *Bode*, [1898] 2 Ch. 120, where an alleged custom for the owner of the great tithes to keep a bull and a boar for the use of the parishioners was held to have been impliedly extinguished by the provisions of an Inclosure Act. The Act in question provided for the allotment of certain lands in satisfaction and discharge of the great tithes. KEKEWICH, J., held that the burden of maintaining these animals was not shifted to the allottees of the land. As to the effect upon a custom of an Order in Council creating a new parish out of part of the parish where the custom obtained, see *Bremner* v. *Hull* (1866), L. R. 1 C. P. 748 (a custom as to the appointment of churchwardens).

(*j*) Co. Litt. 115 a: "There is a diversity between an Act of Parliament in the negative and in the affirmative, for an affirmative Act doth not take away a custom; as the Statutes of Wills of 32 & 34 Hen. 8 do not take away a custom to devise lands." Coke further distinguishes between negative Acts of Parliament which are merely declaratory of the law, and affirm the previously existing common law, and negative Acts of Parliament which do not do so; and states that a man may allege a custom against the former and not against the latter. This further distinction is obviously necessary; for to say that a statute merely declaratory of the common law, being expressed in negative words, should operate in localities to which the common law does not apply, would be a direct contradiction.

(*k*) *London Corporation* v. *R.* (1848), 13 Q. B. 30, Ex. Ch., *per* ALDERSON, B., at p. 33, n. (d): "The words 'negative' and 'affirmative' statutes mean nothing. The question is whether they are repugnant or not to that which before existed.

PART IV. Extinguishment of Custom.

can allege a custom against an Act of Parliament (*l*), unless the custom be saved or preserved by another Act of Parliament (*m*).

**462.** Where an Act of Parliament has, according to its true construction, embraced and confirmed a right which has previously existed by custom, that right becomes henceforward a statutory right, and the lower title by custom is merged in and extinguished by the higher title derived from the Act of Parliament (*n*), unless the Act of Parliament merely intended to confirm the right *quâ* custom (*o*). So that where rights which have formerly only existed by custom are embraced and confirmed by an Act of Parliament, which is only temporary in its operation, these rights will be extinguished upon the expiry of the period covered by the Act, or upon its repeal (*p*).

But the effect of an Act of Parliament which recognises the existence and validity of a custom may not operate to create new parliamentary rights in favour of the persons or classes of persons who might formerly have benefited by the custom. Such a statute may merely have the effect of sanctioning the validity of the custom *quâ* custom, without merging the custom in the higher title by statute (*q*). Thus there are several customs in London which have not only the force of a custom, but are also supported and justified by authority of Parliament (*r*).

Customs of London.

In determining how far an Act of Parliament has affected rights of this kind the whole Act must be considered to see whether the rights given by the Act are intended to supersede the rights which previously existed (*s*).

**463.** A custom is not destroyed by being embodied in a bye-law

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That may be more easily shown when the statute is negative than when it is affirmative, but the question is the same." And see *London Corporation* v. *Bernardiston* (1661), 1 Lev. 14, at p. 15: "The customs of London are of such force that they shall stand against negative Acts of Parliament"; *Appleton* v. *Stoughton* (1638), Cro. Car. 516, where the court inclined to the opinion that the custom of London was good as against stat. (1562) 5 Eliz. c. 4, s. 31, which forbade persons to exercise any art etc. without having been apprenticed to it; and *R.* v. *Bagshaw* (1634), Cro. Car. 347.

(*l*) Co. Litt. 115 a: "Regularly a man cannot allege a custom against a statute, because that is matter of record, and is the highest proof and matter of record in law."

(*m*) *Ibid.*; and see *R.* v. *Bagshaw*, *supra*.

(*n*) *New Windsor Corporation* v. *Taylor*, [1899] A. C. 41, *per* Lord DAVEY, at p. 49 (a case on prescription).

(*o*) *Truscott* v. *Merchant Tailors' Co.* (1856), 11 Exch. 855, Ex. Ch., *per* CROMPTON, J., at p. 866: "It is said that the customs of London are parliamentary rights; but they are, nevertheless, customs. The only effect of sanctioning them by statute is, that they are to be treated as good customs. The Legislature did not mean to give parliamentary rights to the City of London, but only that the customs should be good *quâ* customs, as sanctioned to that extent by the Legislature."

(*p*) *New Windsor Corporation* v. *Taylor*, *supra*.

(*q*) See *Truscott* v. *Merchant Tailors' Co.*, *supra*, *per* CROMPTON, J., at p. 866, where it was held that the custom of London as to light had been abrogated by the Prescription Act, 1832 (2 & 3 Will. 4, c. 71).

(*r*) *City of London Case* (1609), 8 Co. Rep. 121 b.

(*s*) *Manchester Corporation* v. *Lyons* (1882), 22 Ch. D. 287, C. A., *per* COTTON, L.J., at p. 307 (dealing with an ancient franchise to hold a market which had formerly rested on prescription and not on custom).

of an ancient corporation (*t*), nor by mere lapse of time, during which no act of enjoyment has occurred. Thus, where a custom is shown to have existed at a period long past, the custom will be held to be still existing, although no act of enjoyment can be shown since that period (*a*).

# Part V.—Nature of Usages.

## SECT. 1.—*Definitions.*

Usages defined.

**464.** Usage may be broadly defined as a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life (*b*); or more fully as a particular course of dealing or line of conduct which has acquired such notoriety, that where persons enter into contractual relationships, in matters respecting the particular branch of business life where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary; that is to say, that a rule of conduct amounts to a usage, if so generally known in the particular department of business life in which the case occurs, that, unless expressly or impliedly excluded, it must be considered as forming part of the contract (*c*). Usage in this sense must be distinguished from user or enjoyment in relation to incorporeal rights (*d*), and from the course of conduct of the persons interested under a particular ancient charter or other ancient document. In this last sense it is limited to the conduct of persons actually affected by the document in question, and may be referred to only for the purpose of showing the meaning of expressions which by reason of their antiquity have become obscure (*e*).

(*t*) *Shaw* v. *Poynter* (1834), 2 Ad. & El. 312; and see *Clark* v. *Denton* (1830), 1 B. & Ad. 92; *Fazakerley* v. *Wiltshire* (1721), 1 Stra. 462; *R.* v. *London* (*Chamberlain*) (1724), 8 Mod. Rep. 267; *London* (*Chamberlain*) v. *Compton* (1826), 7 Dow. & Ry. (K. B.) 597.

(*a*) *Scales* v. *Key* (1840), 11 Ad. & El. 819; and see p. 235, *ante*.

(*b*) For judicial definitions of usages, or for passages from which the nature of a usage may be best ascertained see the following cases: *Hutton* v. *Warren* (1836), 1 M. & W. 466, *per* PARKE, B., at p. 475; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, C. A., *per* KAY, L.J., at p. 370; *Lewis* v. *Marshall* (1844), 7 Man. & G. 729, *per* TINDAL, C.J., at p. 744; *Myers* v. *Sarl* (1860), 3 E. & E. 306, *per* COCKBURN, C.J., at p. 315; *Moult* v. *Halliday*, [1898] 1 Q. B. 125, *per* CHANNELL, J., at p. 129, where, however, he used the word "custom," although obviously not referring to an immemorial custom; *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.*, [1908] 2 K. B. 907, C. A., *per* BUCKLEY, L.J., at p. 923; *Brown* v. *Byrne* (1854), 3 E. & B. 703, *per* COLERIDGE, J., at p. 715; *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802, *per* BRETT, J., at p. 817; *Nelson* v. *Dahl* (1879), 12 Ch. D. 568, C. A., *per* JESSEL, M.R., at p. 575.

(*c*) *Moult* v. *Halliday*, *supra*, at p. 129.

(*d*) See title EASEMENTS AND PROFITS À PRENDRE.

(*e*) *R.* v. *Varlo* (1775), 1 Cowp. 248; *Beaufort* (*Duke*) v. *Swansea Corporation* (1849), 3 Exch. 413 (the question being what was the Seignory of Gower, evidence of habitual use of the foreshore by the grantees was admitted to show that the foreshore was included in the grant); *Chad* v. *Tilsed* (1821), 2 Brod. &

SECT. 1. Definitions.

Scope of usages.

**465.** A usage may exist in any trade (*f*), occupation, profession, or branch of commercial or mercantile life (*g*), and between parties bearing certain contractual or even domestic relationships to one another, either generally throughout the kingdom (*h*) or in a sphere extending beyond the limits of the realm (*i*), or within some local area, however small (*k*). A usage differs from an immemorial custom in this respect, for the latter must be local (*l*). A usage may exist in respect of a very limited class (*m*), and may be confined

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Bing. 403 (modern inclosure and use of a bay covered only at high tide held to raise a presumption of similar user since the date of a grant of Henry VIII., and relied upon as showing the meaning of the grant); *Stammers* v. *Dixon* (1806), 7 East, 200 (grant of land interpreted by usage to mean merely a grant of the fore crop or *prima tonsura*); and see title DEEDS AND OTHER INSTRUMENTS, p. 446, *post*.

(*f*) *Myers* v. *Sarl* (1860), 3 E. & E. 306; *North* v. *Bassett*, [1892] 1 Q. B. 333 (building trade); *Yates* v. *Pym* (1816), 6 Taunt. 446 (bacon trade); *Johnston* v. *Usborne* (1840), 11 Ad. & El. 549 (corn trade); *Plaice* v. *Allcock* (1866), 4 F. & F. 1074 (bleaching trade); *Chawner* v. *Cummings* (1846), 8 Q. B. 311 (glove trade); *Cropper* v. *Cook* (1868), L. R. 3 C. P. 194 (wool trade); *Knowles* v. *Horsfall* (1821), 5 B. & Ald. 134 (wine trade); *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148 (horse-dealing trade); *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126 (fruit trade); *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438, C. A. (iron trade); and see p. 274, *post*.

(*g*) *Murray* v. *Currie* (1836), 7 C. & P. 584 (estate agents); *Re Page* (No. 3) (1863), 32 Beav. 487 (auctioneers); *Crawcour* v. *Salter* (1881), 18 Ch. D. 30, C. A. (hotel keepers); *Grant* v. *Maddox* (1846), 15 M. & W. 737 (actors); *Moon* v. *Whitney Union Guardians* (1837), 3 Bing. (N. C.) 814 (architects); *Imperial Marine Insurance Co.* v. *Fire Insurance Corporation* (1879), 4 C. P. D. 166 (underwriters); *Alston* v. *Herring* (1856), 11 Exch. 822 (shipping merchants); *Burnett* v. *Bouch* (1840), 9 C. & P. 620 (shipping brokers); *Harris* v. *Truman* (1882), 9 Q. B. D. 264, C. A. (malting agents); and see p. 283, *post*.

(*h*) *Hutton* v. *Warren* (1836), 1 M. & W. 466 (landlord and tenant); *Moult* v. *Halliday*, [1898] 1 Q. B. 125 (masters and domestic servants); *Metzner* v. *Bolton* (1854), 9 Exch. 518 (commercial travellers); *Helps* v. *Clayton* (1864), 17 C. B. (N. S.) 553; *Universo Insurance Co. of Milan* v. *Merchants Marine Insurance Co.*, [1897] 2 Q. B. 93, C. A. (a man and his intended wife).

(*i*) *Coventry* v. *Gladstone* (1867), L. R. 4 Eq. 493 (a usage of East India merchants); *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476 (a usage of merchants throughout the more civilised portions of the world to treat certain scrip and bonds of foreign Governments as negotiable instruments); *Lickbarrow* v. *Mason* (1793), 6 East, 21, H. L.; 1 Smith, L. C., 11th ed., 693 (usage amongst merchants and shippers generally to treat bills of lading as passing the property in the goods contained in them).

(*k*) As, for instance, among persons engaged in mining operations in a particular locality (*Clayton* v. *Gregson* (1836), 5 Ad. & El. 302); between landlords and tenants in certain localities (see p. 257, *post*); or among shippers in certain ports (*Norden Steamship Co.* v. *Dempsey* (1876), 1 C. P. D. 654; *Brown* v. *Byrne* (1854), 3 E. & B. 703). See also *Senior* v. *Armytage* (1816), Holt (N. P.), 197, where a usage for the tenant of a farm in a particular district to provide labour, tillage, sowing, and all materials for cultivation in his away-going year, and for the landlord to compensate him accordingly, was found to prevail only in the immediate neighbourhood of the defendant's estates, and to be so restricted as regards area as to be almost confined to those estates. Customs of the country (as to which see p. 257, *post*) are examples of local usages.

(*l*) *Legh* v. *Hewitt* (1803), 4 East, 154, *per* Lord ELLENBOROUGH, C.J., at p. 159. See p. 229, *ante*.

(*m*) *Temple, Thomson and Clarke* v. *Runnalls* (1902), 18 T. L. R. 822, C. A., where a usage as to the loading of stone cargoes was confined to the only shipper of stone from the port. But see *Lawson* v. *Burness* (1862), 1 H. & C. 396, where the jury found that a vessel was loaded according to the practice of a colliery, but that such practice was not an established or known usage.

to a very limited area (*n*). The area may even be the property of, and controlled by, one person (*o*). But a usage of a port cannot be established merely by three or four important classes of persons in the community of a port agreeing that it is desirable (*p*).

Effect upon contractual obligations.

**466.** Where persons enter into contractual obligations with one another under circumstances governed by a particular usage, then that usage, when proved, must be considered as part of the agreement (*q*). The contract expresses what is peculiar to the bargain between the parties, and the usage supplies the rest (*r*). This is the case even where the agreement is in writing (*s*). Although the usage is unwritten, it is to be treated exactly as if that unwritten customary clause had been written out at length (*a*).

Express or implied exclusion of usage.

**467.** It is, however, competent for the parties, notwithstanding that the case is otherwise governed by a usage, to exclude the operation of the usage (*b*), or to modify its application either by express stipulation (*c*) or impliedly by provisions inconsistent with such usage (*d*).

Usage out of vogue.

**468.** Since usage is based purely upon habitual practice, it follows that by disuse of the practice usage loses its notoriety and disappears (*e*). This does not necessarily occur merely because persons frequently contract themselves out of the usage, but if the

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(*n*) *The Sheila*, [1909] P. 31, n., where the usage was confined to the jetties of a railway company in the port of Fowey; compare, however, *Lawson* v. *Burness* (1862), 1 H. & C. 396.

(*o*) *Temple, Thomson and Clarke* v. *Runnalls* (1902), 18 T. L. R. 822, C. A.

(*p*) *Sea Steamship Co.* v. *Price, Walker & Co.* (1903), 8 Com. Cas. 292, *per* KENNEDY, J., at p. 295.

(*q*) *Clark* v. *Smallfield* (1861), 4 L. T. 405, *per* COCKBURN, C.J.; *Metzner* v. *Bolton* (1854), 9 Exch. 518, *per* PARKE, B., at p. 521.

(*r*) *Meyer* v. *Dresser* (1864), 16 C. B. (N. S.) 646, *per* ERLE, C.J., at pp. 660, 661.

(*s*) *Gibson* v. *Small* (1853), 4 H. L. Cas. 353, *per* PARKE, B., at p. 397: "The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others, which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable"; and see *Wilkins* v. *Wood* (1848), 17 L. J. (Q. B.) 319, *per* Lord DENMAN, C.J., at p. 320; *Smith* v. *Wilson* (1832), 3 B. & Ad. 728.

(*a*) *Tucker* v. *Linger* (1883), 8 App. Cas. 508, *per* Lord BLACKBURN, at p. 511; *Meyer* v. *Dresser*, *supra*, *per* ERLE, C.J., at p. 660.

(*b*) *Gibson* v. *Small*, *supra*, *per* PARKE, B., at p. 397; *Brenda Steamship Co.* v. *Green*, [1900] 1 Q. B. 518, C. A. (exclusion of usage of the port in a charterparty); see also *Ropner & Co.* v. *Stoate, Hosegood & Co.* (1905), 92 L. T. 328, *per* CHANNELL, J., at p. 332, where the result of habitual contracting out of a usage is considered; *Tucker* v. *Linger*, *supra*. For express exclusion of usage, see *Brenda Steamship Co.* v. *Green*, *supra*.

(*c*) *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482; *Aktiesellkab Helios* v. *Ekman & Co.*, [1897] 2 Q. B. 83, C. A.

(*d*) *Tucker* v. *Linger*, *supra*; *Humfrey* v. *Dale* (1857), 7 E. & B. 266; *Parker* v. *Ibbetson* (1858), 4 C. B. (N. S.) 346. For an instance of a practice of shipowners to commit breaches of the charterparties paying compensation in case of loss, see *Royal Exchange Shipping Co.* v. *Dixon* (1886), 12 App. Cas. 11; and *Apollinaris Co.* v. *Nord Deutsche Insurance Co.*, [1904] 1 K. B. 252.

(*e*) *Moult* v. *Halliday*, [1898] 1 Q. B. 125, *per* CHANNELL, J., at p. 130.

SECT. 1. Definitions.

practice of contracting out becomes so general that the adoption of the usage becomes the exception rather than the rule, the usage becomes thereby extinguished (*f*). A usage may be extinguished by the gradual adoption of another usage which is inconsistent with it (*g*).

## SECT. 2.—*Characteristics.*

### SUB-SECT. 1.—*In General.*

Essential characteristics.

**469.** Every usage, whether in respect of a particular trade, branch of business or occupation, and whether affecting land or not, must be notorious, certain, and reasonable, and it must not offend against the intention of any legislative enactment (*h*). It is no objection to a usage that it cannot be shown to have existed from time immemorial. Evidence of such existence is not required (*i*). It is not so much a question of the length of time that a usage has existed as the notoriety which it has gained that must be considered in determining whether or not a particular usage applies in a particular case (*k*); for usage, however recent, may be valid, provided it be generally known (*l*).

### SUB-SECT. 2.—*Notoriety.*

Notoriety.

**470.** Every usage must have acquired such notoriety in the branch of trade or commerce or in the department of business or amongst the class of persons who are affected by it, that any person in that branch or department or class who enters into a contract of a nature affected by the usage must be taken to have done so with the intention that the usage should form part of the contract (*m*).

A usage of trade by which goods are left in the possession of persons to whom they do not belong must, in order to exclude the doctrine of reputed ownership in regard to the laws of bankruptcy, be a notorious usage; that is to say, it must be generally known

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(*f*) *Ropner & Co.* v. *Stoate, Hosegood & Co.* (1905), 92 L. T. 328, *per* CHANNELL, J., at p. 332.

(*g*) *Moult* v. *Halliday*, [1898] 1 Q. B. 125.

(*h*) For judicial *dicta* upon the general essential characteristics of a valid usage, see *Nelson* v. *Dahl* (1879), 12 Ch. D. 568, C. A., *per* JESSEL, M.R., at p. 575; *Devonald* v. *Rosser & Sons*, [1906] 2 K. B. 728, C. A., *per* FARWELL, L.J., at p. 743; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, C. A., *per* KAY, L.J., at p. 370.

(*i*) *Dashwood* v. *Magniac*, *supra*.

(*k*) *Moult* v. *Halliday*, *supra*, *per* CHANNELL, J., at p. 130. As to the question whether modern usage can attach the incident of negotiability to written instruments which otherwise would not be negotiable, see p. 260, note (*s*), *post*.

(*l*) *Crouch* v. *Crédit Foncier of England* (1873), L. R. 8 Q. B. 374, *per* BLACKBURN, J., at p. 386.

(*m*) *R.* v. *Stoke-upon-Trent* (*Inhabitants*) (1843), 5 Q. B. 303, *per* Lord DENMAN, C.J., at p. 307, and *per* COLERIDGE, J., at p. 308; *Re Goetz, Jonas & Co., Ex parte The Trustee*, [1898] 1 Q. B. 787, C. A., *per* A. L. SMITH, L.J., at p. 795; *Nelson* v. *Dahl*, *supra*, *per* JESSEL, M.R., at p. 575; *Devonald* v. *Rosser & Sons*, *supra*, *per* FARWELL, L.J., at p. 743; *Plaice* v. *Allcock* (1866), 4 F. & F. 1074; *Rainy* v. *Vernon* (1840), 9 C. & P. 559; *Holderness* v. *Collinson* (1827), 7 B. & C. 212, *per* BAYLEY, L.J., at p. 216.

in that particular trade or business, and not merely known to persons dealing in a particular market (*n*); and it must be so well known that the ordinary creditors of a person carrying on such a trade or business are likely to know that it exists(*o*).

SECT. 2. Characteristics.

SUB-SECT. 3.—*Certainty.*

**471.** Every usage must be certain (*p*). It must be uniform as well as reasonable, and in order to be incorporated as a term in a written contract it must have just as much certainty as the written contract itself (*q*).

Certainty.

A usage is not, however, bad for uncertainty because it depends in its operation upon what a tribunal thinks to be reasonable (*r*).

SUB-SECT. 4.—*Reasonable Nature.*

**472.** A usage must be shown to be reasonable before it will be imported into a contract (*r*). Whether a custom is reasonable or

Reasonableness.

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(*n*) *Re Goetz, Jonas & Co., Ex parte The Trustee*, [1898] 1 Q. B. 787, C. A.; *Re Hill* (1875), 1 Ch. D. 503, n., C. A. (an alleged usage of coach builders); *Re Matthews, Ex parte Powell* (1875), 1 Ch. D. 501, C. A. (usage of hotel keepers and furniture dealers); *Re Florence, Ex parte Wingfield* (1879), 10 Ch. D. 591, C. A., *per* JESSEL, M.R., at pp. 593, 594; *Re Woodward, Ex parte Huggins* (1886), 54 L. T. 683. As to reputed ownership, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 173.

(*o*) *Re Hill, supra; Re Matthews, Ex parte Powell, supra; Re Couston, Ex parte Watkins* (1873), 8 Ch. App. 520.

(*p*) *Sewell* v. *Corp* (1824), 1 C. & P. 392, *per* BEST, C.J., at p. 393; *Devonald* v. *Rosser & Sons*, [1906] 2 K. B. 728, C. A., *per* FARWELL, L.J., at p. 743; *Cooper* v. *Strauss & Co.* (1898), 14 T. L. R. 233; *Re Walkers, Winser, Hamm and Shaw, Son & Co.*, [1904] 2 K. B. 152, *per* CHANNELL, J., at p. 159; *Daun* v. *City of London Brewery Co.* (1869), L. R. 8 Eq. 155; *Harker* v. *Edwards* (1887), 57 L. J. (Q. B.) 147, C. A., *per* Lord ESHER, M.R., at p. 148.

(*q*) *Nelson* v. *Dahl* (1879), 12 Ch. D. 568, C. A., *per* JESSEL, M.R., at p. 575; The decision was reversed (*Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38), but the above *dictum* was not questioned; *Re Walkers, Winser, Hamm and Shaw, Son & Co., supra*, where a usage in the London corn trade preventing buyers from rejecting grain for difference or variation in quality, unless the same was excessive or unreasonable, and was so found by arbitration under the contract, was held not to be bad on the ground of uncertainty.

(*r*) *Tucker* v. *Linger* (1883), 8 App. Cas. 508, *per* Lord BLACKBURN, at p. 513, and *per* Lord O'HAGAN, at p. 509; *Todd* v. *Reid* (1821), 4 B. & Ald. 210; see also *Paxton* v. *Courtnay* (1860), 2 F. & F. 131, where it was held that an alleged usage in the undertaking trade was unreasonable, whereby it was claimed that undertakers, in each funeral, might charge the entire original cost of certain articles of funeral furniture used, although these articles might be used at other funerals; *Paxton* v. *Courtnay, supra*, citing MAULE, J.: "It is a usage in the strawberry business to put all the big strawberries at the top of the pottle, and all the bad ones at the bottom; but that would hardly be a valid custom as against a purchaser who bought a fair pottle"; *Bradburn* v. *Foley* (1878), 3 C. P. D. 129, where an alleged usage that an outgoing tenant should look to the incoming tenant for payment for seeds, tillage etc. properly bestowed by the former upon a farm in the last months of his tenancy, and that the landlord was thereby relieved from all liability, was held unreasonable and bad; *Gibson* v. *Crick* (1862), 1 H. & C. 142, where an alleged usage amongst shipbrokers for the payment of commission upon introductions was held bad; *Plaice* v. *Allcock* (1866), 4 F. & F. 1074, where a usage for Nottingham bleachers to have a general lien over goods sent them to bleach was held reasonable; *Scott* v. *Irving* (1830), 1 B. & Ad. 605, *per*

SECT. 2. Characteristics.

not is a question for the court (*s*); but the question whether or not the usage exists is for the jury. Evidence therefore which tends to show that an alleged usage would be unreasonable is material as tending to show that such a usage does not exist (*a*).

No one who is ignorant of an alleged usage can be bound by it if it appears to be unreasonable, for he can only be assumed to have acquiesced in a reasonable usage (*b*).

When usage is reasonable.

**473.** A usage is not reasonable unless it be fair and proper and such as reasonable, honest, and right-minded men would adopt (*c*). A usage, however, which is founded on the general convenience of all parties engaged in a particular department of business can never be said to be unreasonable (*d*). There can be very few cases, where a usage has been sufficiently proved, in which a court could hold that the usage was unreasonable, for the fact that the usage has been established and followed tends to show that the usage is convenient (*e*).

An arrangement which it would not be unreasonable for individual persons to adopt by express agreement, would not be

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Lord TENTERDEN, C.J., at pp. 612 *et seq.*; *Bottomley* v. *Forbes* (1838), 5 Bing. (N. C.) 121, *per* TINDAL, C.J., at pp. 127, 128; *Neilson* v. *James* (1882), 9 Q. B. D. 546, C. A., *per* Lord COLERIDGE, C.J., at p. 550, *per* BRETT, L.J., at p. 552, and *per* COTTON, L.J., at p. 554, where an alleged usage of the Stock Exchange to disregard the provisions of a statute was held unreasonable; *Daun* v. *City of London Brewery Co.* (1869), L. R. 8 Eq. 155; *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802, *per* BRETT, J., at p. 818; *Perry* v. *Barnett* (1885), 15 Q. B. D. 388, C. A., *per* BRETT, M.R., at p. 392, and *per* BAGGALLAY, L.J., at p. 395 (an alleged usage of the London Stock Exchange); *Nelson* v. *Dahl* (1879), 12 Ch. D. 568, C. A., *per* JESSEL, M.R., at p. 575; *Sanders* v. *Jameson* (1848), 2 Car. & Kir. 557, where a usage was held reasonable that when corn is sold by sample, if the buyer does not on the day the corn is sold examine the bulk and reject it, he cannot afterwards reject it, or refuse to pay the whole price; *Blackburn* v. *Mason* (1883), 68 L. T. 510, C. A.; *Harker* v. *Edwards* (1887), 57 L. J. (Q. B.) 147, *per* Lord ESHER, M.R., at p. 148 (usage of the London Stock Exchange that brokers contracting in their own name make themselves personally liable as principals); *Davis & Co.* v. *Howard* (1890), 24 Q. B. D. 691, *per* CHARLES, J., at pp. 692 *et seq.*; *Smith* v. *Reynolds* (1891), 8 T. L. R. 137, *per* DENMAN, J., at p. 138; *Moult* v. *Halliday*, [1898] 1 Q. B. 125; *Sea Steamship Co.* v. *Price, Walker & Co.* (1903), 8 Com. Cas. 292, where an alleged usage that a steamer should be regarded as properly discharged if she was discharged at a certain rate, whatever might be the size of the steamer, was held unreasonable; *Gibbon* v. *Pease*, [1905] 1 K. B. 810, C. A., where an alleged usage among architects entitling them to property in the plans after the work had been executed was held unreasonable; *Ropner & Co.* v. *Stoate, Hosegood & Co.* (1905), 92 L. T. 328, *per* CHANNELL, J., at p. 330 (alleged usage to navigate lighters across a harbour bar by means of a warp); *Devonald* v. *Rosser & Sons*, [1906] 2 K. B. 728, C. A., *per* FARWELL, L.J., at p. 743.

(*s*) *Bradburn* v. *Foley* (1878), 3 C. P. D. 129, *per* LINDLEY, J., at p. 135; *Bottomley* v. *Forbes* (1838), 5 Bing. (N. C.) 121, *per* TINDAL, C.J., at p. 128.

(*a*) *Bottomley* v. *Forbes*, *supra*, *per* TINDAL, C.J., at p. 128.

(*b*) *Neilson* v. *James*, *supra*, *per* BRETT, L.J., at p. 552; *Scott* v. *Irving* (1830), 1 B. & Ad. 605, *per* Lord TENTERDEN, at p. 612. See further pp. 266 *et seq.*, *post*.

(*c*) *Paxton* v. *Courtnay* (1860), 2 F. & F. 131, *per* KEATING, J. See also *Leuckhart* v. *Cooper* (1836), 3 Bing. (N. C.) 99, *per* TINDAL, C.J., at pp. 107, 109.

(*d*) *Grissell* v. *Bristowe* (1868), L. R. 4 C. P. 36, Ex. Ch., *per* COCKBURN, C.J., at p. 48.

(*e*) *Moult* v. *Halliday*, *supra*, *per* CHANNELL, J., at p. 130.

unreasonable as a usage if adopted by a class of persons dealing in a particular commodity or engaged in a particular business (*f*). SECT. 2. Characteristics.

SUB-SECT. 5.—*Legality.*

**474.** A usage must also be legal. No usage, however extensive, will be allowed to prevail if it be directly opposed to positive law, which for this purpose includes such usages as, having been sanctioned and adopted by the courts, have become, by such adoption, part of the common law; for, to give effect to a usage which involves a defiance of the law would be obviously contrary to fundamental principle (*g*). An incident which the parties to a contract cannot themselves introduce into the contract by express stipulation cannot be annexed to that contract by tacit stipulation arising from alleged usage (*h*). Legality.

Thus, an alleged usage is not valid which would tend to alter interests in land as recognised by established legal principles; or which would allow interests in land to be created in writing, contrary to the provisions of the Statute of Frauds (*i*).

**475.** Similarly, the superior courts have at all times investigated the customs and usages which have been adopted by inferior courts as part of their practice, and, unless such usages are found to be in harmony with the principles of law, they have always been rejected as illegal (*l*). Practice of inferior courts.

A usage may, however, supplement and even vary (*m*) the law,

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(*f*) *Grissell* v. *Bristowe* (1868), L. R. 4 C. P. 36, Ex. Ch., *per* COCKBURN, C.J., at p. 47.

(*g*) *Goodwin* v. *Robarts* (1875), L. R. 10 Exch. 337, Ex. Ch., *per* COCKBURN, C.J., at p. 357; *Neilson* v. *James* (1882), 9 Q. B. D. 546, C. A., *per* Lord COLERIDGE, C.J., at p. 551, *per* BRETT, L.J., at p. 552, *per* COTTON, L.J., at p. 554; *Daun* v. *City of London Brewery Co.* (1869), L. R. 8 Eq. 155, at p. 161; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, C. A., *per* KAY, L.J., at p. 372. See, however, *Stewart* v. *West India and Pacific Steamship Co.* (1873), L. R. 8 Q. B. 88, 362, Ex. Ch. For cases where alleged usages have been held bad as contrary to settled principles of law, see *Edie* v. *East India Co.* (1761), 2 Burr. 1216, at p. 1222; *Oppenheim* v. *Russell* (1802), 3 Bos. & P. 42.

(*h*) *Crouch* v. *Crédit Foncier of England* (1873), L. R. 8 Q. B. 374, at p. 386.

(*i*) *Daun* v. *City of London Brewery Co.*, *supra*, *per* JAMES, V.-C., at p. 161 (an alleged usage between brewers and publicans entitling a brewer to add further sums to a debt secured by the deposit of deeds to the prejudice of a second mortgagee).

(*l*) *Cox* v. *London Corporation* (1862), 1 H. & C. 338, *per* POLLOCK, C.B., at p. 358.

(*m*) *Harker* v. *Edwards* (1887), 57 L. J. (Q. B.) 147; and see *supra*. There have been *dicta* which at first sight appear to suggest that a usage which attempts to vary the common law is illegal; but those *dicta* really appear to establish merely that a usage which differs from the law cannot have a world-wide application (*Meyer* v. *Dresser* (1864), 16 C. B. (N. S.) 646), or that a usage which sets at defiance the ordinary rules of law and justice is unreasonable and therefore invalid (*Sea Steamship Co.* v. *Price, Walker & Co.*, *supra*, at pp. 295, 296; *Oppenheim* v. *Russell* (1802), 3 Bos. & P. 42; *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.*, [1908] 2 K. B. 907, C. A., *per* FLETCHER MOULTON, L.J., at p. 922. In *Attwood* v. *Sellar* (1879), 4 Q. B. D. 342, MANISTY, J., said that a usage could vary the law. The rest of the court decided the case on the footing that the practice in question was not a usage.

SECT. 2. Characteristics.

and the fact that an alleged usage does not form part of the ancient law merchant is not a sufficient reason for refusing to give effect to it (*n*).

# Part VI.—Classification of Usages.

## SECT. 1.—*Various Classifications.*

Classification.

**476.** Usages may be divided into usages of which the courts take judicial notice (*o*) and usages which must be proved to the satisfaction of the court (*p*). The former class includes all usages comprised in the law merchant (*q*). Usages may also be classified under three heads, namely, usages peculiar to particular localities and to particular local trades and occupations (*r*), usages which are general as regards locality but confined to particular trades and occupations within the realm, and usages which extend beyond the realm (*s*). The last-mentioned usages are similarly confined to particular occupations or to persons bearing certain relationships to one another.

Usages may be further classified into usages which affect the land (*a*), and are because of their nature invariably of a local character, and usages which in no way affect the land or the relationships of persons interested in land, but affect persons engaged in certain trades and occupations (*b*). The latter division

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(*n*) *Goodwin* v. *Robarts* (1875), L. R. 10 Exch. 337, Ex. Ch., at p. 356.

(*o*) As to judicial notice generally, see p. 272, *post*.

(*p*) See p. 270, *post*.

(*q*) *Brandao* v. *Barnett* (1846), 12 Cl. & Fin. 787, H. L., *per* Lord CAMPBELL, at p. 805; *Goodwin* v. *Robarts*, *supra*, *per* COCKBURN, C.J., at p. 346; *Erskine* v. *Murray* (1728), 2 Ld. Raym. 1542; *Soper* v. *Dible* (1697), 1 Ld. Raym. 175; *Carter* v. *Dowrish* (1689), Carth. 83; *Williams* v. *Williams* (1693), Carth. 269.

(*r*) Customs of the country and other agricultural usages (as to which see p. 275, *post*) fall under this class. So also do customs of ports and usages of local markets, as, for instance, of the London dry goods market (*Imperial Bank* v. *London and St. Katherine Docks Co.* (1877), 5 Ch. D. 195), or the Liverpool wool market (*Cropper* v. *Cook* (1868), L. R. 3 C. P. 194), or the Bristol wine trade (*Re Hancock, Ex parte Ludlow*, [1879] W. N. 65).

(*s*) As, for instance, the usages of brokers (*Humfrey* v. *Dale* (1857), 7 E. & B. 266; *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802); usages appertaining to the employment of domestic servants (*Moult* v. *Halliday*, [1898] 1 Q. B. 125).

(*a*) So-called customs of the country, which are almost invariably agricultural usages and not immemorial customs (*Dashwood* v. *Magniac*, [1891] 3 Ch. 306, C. A., *per* KAY, L.J., at p. 370), form a large and important class of usages which affect land. The phrase "custom of the country" is essentially a loose one and has been applied to strict immemorial customs, to agricultural usages affecting the rights of landlords and tenants, and to usages which do not affect land at all. The second of these applications is the most correct. See also title AGRICULTURE, Vol. I., p. 243.

(*b*) As, for instance, usages of the iron trade (*Gunn* v. *Bolckow, Vaughan & Co.* (1875), 10 Ch. App. 491; *Merchant Banking Co. of London* v. *Phœnix*

includes those mercantile usages which are comprised in the law merchant (*c*) as well as other mercantile usages which exist irrespective of territorial or national considerations (*d*).

SECT. 1. Various Classifications.

SECT. 2.—*Usages between Landlord and Tenant.*

Landlord and tenant.

**477.** The common law has done so little to prescribe the relative duties of landlord and tenant, leaving the latter at liberty to pursue any course of management he pleases provided he is not guilty of waste, that the courts have been favourably inclined to the introduction of such regulations in the mode of cultivation as have been shown by experience in any district to be the most beneficial to all parties (*e*). These regulations under the name of "customs of the country" or "tenant-right" have long prevailed in different counties and districts of the country, and include claims to remuneration of an outgoing agricultural tenant for various operations of husbandry, the ordinary return for which he is precluded from receiving by the termination of his tenancy. This claim ordinarily extends to one or more of the following objects, namely, the crop which the outgoing tenant has sown and leaves in the ground, the preparation of the soil for crops by tillage, the straw, hay, and dung left on the farm, and growing underwood.

"Customs of the country."

Agricultural holdings.

**478.** In some parts of the country a modern usage has sprung up conferring a right on the outgoing tenant to be reimbursed certain expenses incurred by him in cultivation, other than those of ordinary husbandry above referred to. Among these expenses are included the purchase of food for stock, the purchase of certain kinds of manure, and the draining, chalking, and marling of the soil. These usages have gradually grown into general acceptance in certain districts until they have ultimately become recognised there as the custom of the country (*f*).

These local usages are imported into leases or agreements for the letting and occupation of land between landlords and their tenants,

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*Bessemer Steel Co.* (1877), 5 Ch. D. 205; *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438, C. A.); of the glove trade (*Chawner* v. *Cummings* (1846), 8 Q. B. 311); of piano dealers (*Re Blanshard, Ex parte Hattersley* (1878), 8 Ch. D. 601).

(*c*) As to the law merchant, see p. 259, *post*.

(*d*) As, for instance, the usage of East India merchants (*Coventry* v. *Gladstone* (1867), L. R. 4 Eq. 493).

(*e*) *Hutton* v. *Warren* (1836), 1 M. & W. 466, *per* PARKE, B., at p. 476.

(*f*) See the Report of the Select Committee on Agricultural Custom, 1848, clauses 1, 2, 4, 5, and 8; usages of the foregoing nature are expressly preserved by the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 1 (3); after this report was made the Central Chamber of Agriculture issued three reports on "Unexhausted Improvements" in 1873 and 1874. The second report stated that the Report of the Select Committee on Agricultural Custom, 1848, could no longer be relied upon as giving a full or accurate account of the customs of the country, inasmuch as those prevailing in 1873 showed a marked difference to those prevailing in 1848. It therefore follows that the present customs of the country are probably different, to a considerable extent, from those of 1873, and that, as this change is constantly in progress, it is of little use specifying the present customs of the country with any particularity. For the same reason cases decided many years ago upon the then existing agricultural customs are of little use as affording a guide to the present customs. See also title AGRICULTURE, Vol. I., p. 243.

SECT. 2. Usages between Landlord and Tenant.

who are presumed to contract with reference to the local usage unless the terms of the agreement, expressly or by implication, negative such a presumption (*g*).

Written contracts.

**479.** Where there is a written agreement between the parties, it is naturally to be expected that it will contain all the terms of this bargain; but if it is entirely silent as to some material particular, such as the terms of quitting, it may let in the custom of the country as to that particular (*h*). If, however, it specifies any of those terms, regard must be had to the lease alone (*i*). The custom of the country applies only where the specific terms are unknown, and is usually based on the principle that a tenant should in justice quit upon the same terms as those upon which he entered. If a tenant on entering the farm has paid for a way-going crop or for foldage, manure, fallowing, or tillage, then, if the lease be wholly silent as to the terms upon which he is to quit, the custom of the country may be introduced entitling him to receive an allowance or compensation (*k*).

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(*g*) See the Report of the Select Committee on Agricultural Custom, 1848, clause 3; *Roberts* v. *Barker* (1833), 1 Cr. & M. 808.

(*h*) *Muncey* v. *Dennis* (1856), 1 H. & N. 216, where a tenant held under a lease stipulating that he should cultivate the farm according to the custom of the country, and that he would consume with stock on the farm, all hay, straw and clover grown thereon, and that the manure thus produced should be used on the farm. Under the custom of the country the tenant would have been entitled to be paid for the straw and manure on leaving. It was held that the lease did not provide for what was to be done as to unconsumed straw on quitting; that (but for any custom) such straw would have been the tenant's property, and that by the custom he was bound to leave it and was entitled to be paid for it; *Hutton* v. *Warren* (1836), 1 M. & W. 466, where the lease contained a covenant by the tenant to spend three-fourths of the hay and straw on the farm and to spread the manure on the land, and to leave such manure as was not so spread at the end of his term for the landlord, who should pay a reasonable price for the same. The custom of the country was that the tenant should receive an allowance for his seeds and labour of cultivation. It was held that this custom was not excluded by the terms of the lease. Compare *Wilkins* v. *Wood* (1848), 17 L. J. (Q. B.) 319; *Beavan* v. *Delahay* (1788), 1 Hy. Bl. 5; *Holding* v. *Pigott* (1831), 7 Bing. 465.

(*i*) *Webb* v. *Plummer* (1819), 2 B. & Ald. 746, where the lease specified certain payments which were to be made by the incoming to the outgoing tenant when quitting the farm, but these payments did not include any payment for foldage. By the custom of the country the outgoing tenant was entitled to an allowance for foldage. It was held that the terms of the lease excluded the custom, and that the outgoing tenant was not entitled to any such allowance. *Clarke* v. *Roystone* (1845), 13 M. & W. 752, where a landlord claimed for payment to which he was entitled under the custom of the country for manure which he had laid on the farm. On evidence being given of a written agreement between him and the tenant reciting the amount of manure which had been expended by the landlord and stating that the tenant agreed to give up the land in the same state, or allow a valuation to be made, it was held that the agreement excluded the custom, as being inconsistent with it. See also *Boraston* v. *Green* (1812), 16 East, 71; *Thorpe* v. *Eyre* (1834), 1 Ad. & El. 926. See, however, *Senior* v. *Armytage* (1816), Holt (N. P.), 197, where a custom of the country under the denomination of "tenant right," for the outgoing tenant to receive compensation for expenses incurred by him in working the land during his away-going year was held to apply although there was a written agreement. The material terms, however, of the agreement do not appear in the report.

(*k*) *Webb* v. *Plummer*, *supra*, *per* BAYLEY, J.

SECT. 2. Usages between Landlord and Tenant.

**480.** Agricultural usages between landlord and tenant also frequently define the species of trees which are regarded as timber in the localities where the usages subsist (*l*).

## SECT. 3.—*The Law Merchant.*

Law merchant.

**481.** Usages of merchants and usages affecting contractual relationships between persons engaged in mercantile transactions must be distinguished from the law merchant. The law merchant includes many, but not all, of the usages subsisting between merchants. The term "law merchant" is an ambiguous one. The relationship which it bears to the common law of this country is particularly difficult to define. It is sometimes spoken of as "ancient" and there is a tendency to attribute to it, in analogy to an immemorial local custom, the requisite of existence from time immemorial (*m*). It is sometimes said to form part of the common law. This statement, however, is somewhat misleading, for it veils the fact that the law merchant is merely a collection of usages. It may be defined as a number of usages, each of which exist among merchants and persons engaged in mercantile transactions, not only in one particular country, but throughout the civilised world, and each of which has acquired such notoriety, not only amongst those persons, but also in the mercantile world at large, that the courts of this country will take judicial notice of it (*n*). A usage of the law merchant has therefore two characteristics—it must in the first place amount to *jus gentium*, that is to say, it must be in vogue beyond the limits of this country and its notoriety must be cosmopolitan rather than national; and in the second place it must be of such a nature that it will receive judicial notice in our courts (*o*). It does not follow, however, that every mercantile usage of which the courts take judicial notice forms part of the law merchant (*p*). It

(*l*) *Whitty* v. *Dillon* (*Lord*) (1860), 2 F. & F. 67; *Aubrey* v. *Fisher* (1809), 10 East, 446, where the usage was pleaded as an immemorial custom. Existence from time immemorial is not, however, a necessary characteristic of such a custom; see *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, C. A., *per* KAY, L.J., at p. 370; *Chandos* (*Duke*) v. *Talbot* (1731), 2 P. Wms. 601, 606; *Palmer's Case* (1611), Co. Litt. 53 a, n. (10); *Cumberland's* (*Countess*) *Case* (1610), Moore (K. B.), 812; *Layfield* v. *Cowper* (1694), 1 Wood, 330; *Guffly* v. *Pindar* (1616), Hob. 219.

(*m*) *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658, at pp. 665, 666.

(*n*) *Lethulier's Case* (1692), 2 Salk. 443, *per* HOLT, C.J.; *Luke* v. *Lyde* (1759), 2 Burr. 882, at p. 887, *per* Lord MANSFIELD.

(*o*) As to judicial notice generally, see p. 272, *post*. That the courts will take judicial notice of the usages comprised in the law merchant, see *Carter* v. *Dowrish* (1689), Carth. 83; *Lethulier's Case*, *supra*; *Williams* v. *Williams* (1693), Carth. 269; *Soper* v. *Dible* (1697), 1 Ld. Raym. 175; *Erskine* v. *Murray* (1728), 2 Ld. Raym. 1542; *Brandao* v. *Barnett* (1846), 12 Cl. & Fin. 787, H. L., *per* Lord CAMPBELL, at p. 805; *Goodwin* v. *Robarts* (1875), L. R. 10 Exch. 337, Ex. Ch., *per* COCKBURN, C.J., at p. 346.

(*p*) The most important of the usages comprised in the law merchant relate to mercantile instruments, such as bills of exchange, promissory notes, cheques, banker's drafts and debentures to bearer, which are treated as negotiable under the law merchant (see title BILLS OF EXCHANGE, Vol. II., pp. 459, 564), and also to bills of lading, to which the same law gives a certain efficacy in passing the property in the goods therein comprised (*Goodwin* v. *Robarts*, *supra*; *Lickbarrow* v. *Mason* (1793), 6 East, 21, H. L.; 1 Smith, L. C., 11th ed., 693); and see title SHIPPING AND NAVIGATION.

SECT. 3. The Law Merchant.

is composed of those usages of merchants and traders in the different departments of trade which have been ratified by the decisions of courts of law and adopted as settled law with a view to the interests of trade and the public convenience. The court proceeds on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it (*q*). It is, therefore, wrong to speak of the law merchant as a fixed body of law, forming part of the common law (*r*), and, as it were, coeval with it; for, as a matter of legal history, such a view is altogether incorrect (*s*).

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# Part VII.—Effect of Usage upon Contracts of all Descriptions.

## SECT. 1.—*Admission of Evidence of Usage Generally.*

Admission of parol evidence.

**482.** As a general rule of construction no evidence is admissible to alter the expressed terms of a contract (*t*), and parol or extrinsic

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(*q*) *Goodwin* v. *Robarts* (1875), L. R. 10 Exch. 337, Ex. Ch., *per* COCKBURN, C.J., at p. 338.

(*r*) See, for instance, *Edie* v. *East India Co.* (1761), 2 Burr. 1216, at p. 1226, where FOSTER, J., stated that the "Custom of merchants, or law of merchants, is the law of the kingdom, and is part of the common law."

(*s*) *Goodwin* v. *Robarts*, *supra*, *per* COCKBURN, C.J., at p. 346. There is a conflict of authority with regard to the question whether the law merchant is a fixed body of law or is susceptible of change. This conflict has arisen with regard to decisions upon the negotiability of certain mercantile instruments. It has been held that the incident of negotiability cannot be annexed to instruments which were unknown to the ancient law merchant or which were not negotiable under its rules (see *Crouch* v. *Crédit Foncier of England* (1873), L. R. 8 Q. B. 376; *London and County Banking Co.* v. *London and River Plate Bank* (1887), 20 Q. B. D. 232). On the other hand, however, there are high authorities which tend to show that modern mercantile usage may annex this incident in respect of documents which are modern in form (see *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476; *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658; *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194; *Venables* v. *Baring Brothers & Co.*, [1892] 3 Ch. 527. Compare also *Partridge* v. *Bank of England* (1844), 9 Q. B. 396, Ex. Ch.; *Ede* v. *East India Co.* (1761), 2 Burr. 1216; *Glyn* v. *Baker* (1811), 13 East, 509; *Wookey* v. *Pole* (1820), 4 B. & Ald. 1; *Pott* v. *Clegg* (1847), 16 M. & W. 321; *Lang* v. *Smith* (1831), 7 Bing. 284, and *Sewell* v. *Burdick* (1884), 10 App. Cas. 74). For a full discussion of the state of the law with regard to the question, see 15 Law Quarterly Review (1899), at pp. 130 and 245, where two articles written respectively by Sir F. A. Bosanquet, K.C., and Sir F. B. Palmer take opposing views; *Luke* v. *Lyde* (1759), 2 Burr. 882, *per* Lord MANSFIELD, at p. 887; *Lethulier's Case* (1692), 2 Salk. 443, *per* HOLT, C.J.

(*t*) *Rutland's (Countess) Case* (1604), 5 Co. Rep. 25 b, at 26 a; *Parteriche* v.

SECT. 1. Admission of Evidence of Usage Generally.

evidence cannot be admitted to contradict, vary, or add to the terms of a deed (*a*). The court must read the whole instrument to ascertain its construction and gather its meaning from the instrument itself (*b*), and from the terms used, according to the sense and meaning of those terms, in their plain, ordinary, and popular sense (*c*).

## SECT. 2.—*Admission of Evidence of Usage to Annex Terms.*

To annex terms.

**483.** The foregoing general rules are, however, subject to modification as regards usages. It has long been settled that in commercial transactions extrinsic evidence of a usage is admissible to annex incidents to written contracts in matters with respect to which they are silent (*d*). The same rule has also been applied to contracts in other transactions of life in which definite usages have been established. The rule is founded on a presumption that the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those usages (*e*). In all contracts as to the subject-matter of which usages prevail parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, as of course, by mutual understanding; evidence, therefore, of such incidents is receivable (*f*). The contract is, in fact, partly expressed in writing and partly implied or understood and unwritten (*g*). The written contract supplies what is particular to the bargain, and the usage supplies the rest (*h*).

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*Powlet* (1742), 2 Atk. 383, *per* Lord HARDWICKE, L.C., at p. 384; *Irnham* (*Lord*) v. *Child* (1781), 1 Bro. C. C. 92, *per* Lord THURLOW, L.C., at p. 93; *Haynes* v. *Hare* (1791), 1 Hy. Bl. 659, *per* Lord LOUGHBOROUGH, C.J., at p. 664; *Goss* v. *Nugent* (*Lord*) (1833), 5 B. & Ad. 58, *per* Lord DENMAN, C.J., at p. 64; and see title DEEDS AND OTHER INSTRUMENTS, p. 444, *post*.

(*a*) *Smith* v. *Doe* d. *Jersey* (1821), 2 Brod. & Bing. 473, H. L., *per* PARK, J., at p. 541.

(*b*) *Blundell* v. *Gladstone* (1841), 11 Sim. 467, *per* SHADWELL, V.-C., at p. 486 (a case of a will); *Bateman* v. *Roden* (*Lord*) (1844), 1 Jo. & Lat. 356; *Richardson* v. *Watson* (1833), 4 B. & Ad. 787, *per* PARKE, J., at p. 799; *Lang* v. *Gale* (1813), 1 M. & S. 111; *Walsh* v. *Trevanion* (1850), 15 Q. B. 733, at p. 751.

(*c*) *Robertson* v. *French* (1803), 4 East, 130, *per* Lord ELLENBOROUGH, C.J., at p. 135; see also *Mallan* v. *May* (1844), 13 M. & W. 511, *per* POLLOCK, C.B., at p. 517; *Carr* v. *Montefiore* (1864), 5 B. & S. 408, Ex. Ch.; *Ford* v. *Ford* (1848), 6 Hare, 486, *per* WIGRAM, V.-C., at p. 490; *Hicks* v. *Sallitt* (1853), 23 L. J. (CH.) 571, C. A.

(*d*) *Hutton* v. *Warren* (1836), 1 M. & W. 466, *per* PARKE, B., at p. 475; *Gulf Line* v. *Laycock* (1901), 7 Com. Cas. 1, *per* KENNEDY, J., at p. 4.

(*e*) *Hutton* v. *Warren*, *supra*, *per* PARKE, B., at p. 475; *Gibson* v. *Small* (1853), 4 H. L. Cas. 353, *per* PARKE, B., at p. 397; *Brown* v. *Byrne* (1854), 3 E. & B. 703, *per* COLERIDGE, J., at p. 715.

(*f*) *Brown* v. *Byrne*, *supra*, *per* COLERIDGE, J., at p. 715; see also *Gibson* v. *Small*, *supra*, *per* PARKE, B., at p. 397; *Meyer* v. *Dresser* (1864), 16 C. B. (N. S.) 646, *per* ERLE, C.J., at p. 660.

(*g*) *Brown* v. *Byrne*, *supra*, *per* COLERIDGE, J., at p. 715; *Humfrey* v. *Dale* (1857), 7 E. & B. 266, *per* Lord CAMPBELL, C.J., at p. 274.

(*h*) *Meyer* v. *Dresser*, *supra*.

SECT. 2. Admission of Evidence of Usage to Annex Terms.

Thus, evidence of usage has been admitted to add terms to contracts relating to marine insurance (*i*), charterparties (*k*), bills of lading (*l*), sale of goods (*m*), Stock Exchange transactions (*n*), building (*o*), brokers (*p*), and actors (*q*), and also to contracts between landlord and tenant (*r*).

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(*i*) *Lethulier's Case* (1692), 2 Salk. 443 (where the words "warranted to depart with convoy" were construed by the usage of merchants to mean that the ship was first to proceed to the rendezvous of the convoy); *Bond* v. *Gonsales* (1704), 2 Salk. 445; *Gordon* v. *Morley* (1747), 2 Stra. 1264; *Petty* v. *Royal Exchange Assurance Co.* (1757), 1 Burr. 341 (usage that ship's sails, when on shore to be cleaned, were still covered by the policy); *Noble* v. *Kennoway* (1780), 2 Doug. (K. B.) 510 (usage that goods remaining on board long after arrival were covered by policy); *Rucker* v. *London Assurance Co.* (1784), 2 Bos. & P. 432, n.; *Brough* v. *Whitmore* (1791), 4 Term Rep. 206; *Vallance* v. *Dewar* (1808), 1 Camp. 503; *Miller* v. *Tetherington* (1862), 7 H. & N. 954, Ex. Ch. (usage that goods jettisoned were not covered by policy).

(*k*) *Bottomley* v. *Forbes* (1838), 5 Bing. (N. C.) 121 (agreement to pay at so much per ton for goods shipped at Bombay; evidence was allowed of a usage to pay according to measurement taken before the goods were put on board); *Chauraud* v. *Angerstein* (1791), Peake, 61 (usage that words "in the month of October" entitled merchants to fix the exact day); *Cuthbert* v. *Cumming* (1855), 11 Exch. 405 (usage of loading sugar in hogsheads); *Pust* v. *Dowie* (1864), 5 B. & S. 20 (usage of the port of loading as to the proportions of weight and measurement tonnage); *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482 (usage as to agents' personal liability if principal not disclosed within a reasonable time); *Norden Steam Co.* v. *Dempsey* (1876), 1 C. P. D. 654; *Aktieselkab Helios* v. *Ekman & Co.*, [1897] 2 Q. B. 83, C. A.

(*l*) *Haynes* v. *Holliday* (1831), 7 Bing. 587, where a shipmaster agreed to carry "a boat" of certain dimensions and was allowed to show that by a usage he was entitled to take off its deck when carried by his ship; *Brown* v. *Byrne* (1854), 3 E. & B. 703; *Russian Steam-Navigation Co.* v. *Silva* (1863), 13 C. B. (N. S.) 610.

(*m*) *Syers* v. *Jonas* (1848), 2 Exch. 111 (usage that a sale of goods should be by sample); *Moore* v. *Campbell* (1854), 10 Exch. 323; *Lucas* v. *Bristow* (1858), E. B. & E. 907 (agreement to purchase a cargo of "best oil," "inferior oil" to be taken at a reduction; evidence of a usage was admitted to show that the contract was only performed if a substantial portion of the whole was "best oil"); *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438, C. A. (usage that manufacturer must supply goods of his own make); *Re Walkers, Winser and Hamm and Shaw, Son & Co.*, [1904] 2 K. B. 152; see also *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.*, [1908] 2 K. B. 907, C. A.

(*n*) *Sutton* v. *Tatham* (1839), 10 Ad. & El. 27; *Bayliffe* v. *Butterworth* (1847), 1 Exch. 425; *Grissell* v. *Bristow* (1868), L. R. 4 C. P. 36, Ex. Ch.; *Coles* v. *Bristowe* (1868), 4 Ch. App. 3; *Scott* v. *Godfrey*, [1901] 2 K. B. 726. See also title STOCK EXCHANGE.

(*o*) *Moon* v. *Witney Union Guardians* (1837), 3 Bing. (N. C.) 814; *Myers* v. *Sarl* (1860), 3 E. & E. 306; *North* v. *Bassett*, [1892] 1 Q. B. 333.

(*p*) *Humfrey* v. *Dale* (1857), 7 E. & B. 266 (liability of broker for undisclosed principal); *Allan* v. *Sundius* (1862), 1 H. & C. 123 (shipping brokers' commission); *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126 (fruit trade); *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802 (tallow trade); *Imperial Bank* v. *London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195 (dry goods trade); *Pike* v. *Ongley* (1887), 18 Q. B. D. 708, C. A. (hop trade).

(*q*) *Grant* v. *Maddox* (1846), 15 M. & W. 737, where an actress was engaged to perform at a certain salary per week, and evidence was allowed to show that she was only entitled to be paid during the theatrical season.

(*r*) *Wigglesworth* v. *Dallison* (1779), 1 Doug. (K. B.) 201, 1 Smith, L. C., 11th ed., 545; *Beavan* v. *Delahay* (1788), 1 Hy. Bl. 5; *Senior* v. *Armytage* (1816), Holt (N. P.), 197; *Holding* v. *Piggott* (1831), 7 Bing 465; *Hutton* v. *Warren* (1836), 1 M. & W. 466; and see *Clayton* v. *Gregson* (1836), 5 Ad. & El. 302. See title LANDLORD AND TENANT.

SECT. 2. Admission of Evidence of Usage to Annex Terms.

Repugnancy.

**484.** But the evidence received must not be of a term which is repugnant to, or inconsistent with, the written contract (*s*). Evidence, in other words, is admissible to explain that which is doubtful, but it is not admissible to contradict that which is plain (*t*). That the usage merely varies the apparent contract, however, is not of itself sufficient to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less (*a*).

In order that the material incident which it is sought to annex shall fall within the exception of repugnancy, the incident must be such as if expressed in the written contract would make it insensible, or inconsistent (*b*), or thoroughly unreasonable (*c*). Thus, evidence of usage whereby it was sought to annex terms has been rejected on the ground of the repugnancy or inconsistency of the usage in the case of contracts relating to marine insurance (*d*), charterparties (*e*), bills of exchange (*f*), brokers (*g*), bills of lading (*h*) and sale of

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(*s*) *Brown* v. *Byrne* (1854), 3 E. & B. 703, *per* COLERIDGE, J., at p. 715; *Reynolds & Co.* v. *Tomlinson*, [1896] 1 Q. B. 586 (charterparty); *Hayton* v. *Irwin* (1879), 5 C. P. D. 130, C. A. (charterparty); see also *Aktieselkab Helios* v. *Ekman & Co.*, [1897] 2 Q. B. 83, C. A., *per* Lord ESHER, M.R., at p. 87; *Cuthbert* v. *Cumming* (1855), 11 Exch. 405, *per* COLERIDGE, J., at p. 408; *Gulf Line* v. *Laycock* (1901), 7 Com. Cas. 1, *per* KENNEDY, J., at p. 4; *Russian Steam-Navigation Co.* v. *Silva* (1863), 13 C. B. (N. S.) 610, *per* KEATING, J., at p. 618.

(*t*) *Blackett* v. *Royal Exchange Assurance Co.* (1832), 2 Tyr. 266, *per* Lord LYNDHURST, C.B., at p. 274. See also *Crofts* v. *Marshall* (1836), 7 C. & P. 597; *Phillipps* v. *Briard* (1856), 1 H. & N. 21; *Abbott* v. *Bates* (1875), 45 L. J. (Q. B.) 117, C. A.; *Bowes* v. *Shand* (1877), 2 App. Cas. 455, *per* Lord CAIRNS, L.C., at p. 468; *Russian Steam-Navigation Co.* v. *Silva*, *supra*, *per* KEATING, J., at p. 618.

(*a*) *Brown* v. *Byrne*, *supra*.

(*b*) *Humfrey* v. *Dale* (1857), 7 E. & B. 266, *per* Lord CAMPBELL, C.J.; *Aktieselkab Helios* v. *Ekman & Co.*, *supra*, *per* Lord ESHER, at p. 87.

(*c*) *Barrow* v. *Dyster* (1884), 13 Q. B. D. 635, where evidence of a usage was rejected because had the usage been incorporated into the written contract (which contained an arbitration clause) the effect would have been to make the interested parties judges in their own cause.

(*d*) *Blackett* v. *Royal Exchange Assurance Co.*, *supra* (usage for underwriters not to pay for loss of boats carried on a ship's quarter); *Hall* v. *Janson* (1855), 4 E. & B. 500; *Dickenson* v. *Jardine* (1868), L. R. 3 C. P. 639 (jettisoned goods).

(*e*) *Phillipps* v. *Briard*, *supra*; *Scrutton* v. *Childs* (1877), 36 L. T. 212; *Hayton* v. *Irwin*, *supra*; *The Alhambra* (1881), 6 P. D. 68; *Lishman* v. *Christie* (1887), 19 Q. B. D. 333, C. A.; *The Nifa*, [1892] P. 411; *Reynolds & Co.* v. *Tomlinson*, *supra*; *Gulf Line* v. *Laycock*, *supra*; *Metcalfe, Simpson & Co.* v. *Thompson, Pattrick and Woodwark* (1902), 18 T. L. R. 706.

(*f*) *Suse* v. *Pompe* (1860), 8 C. B. (N. S.) 538, where a bill of exchange drawn and indorsed in England and payable abroad was dishonoured by the acceptor's non-payment, and the holder was held entitled as against the drawer to recover from the latter the amount of the re-exchange, but evidence of a usage entitling the holder alternatively to recover the sum he gave for the purchase of the bill was rejected, as being evidence of a usage which contradicted the written bill.

(*g*) *Hodgson* v. *Davies* (1810), 2 Camp. 530; *Jones* v. *Littledale* (1837), 6 Ad. & El. 486; *Trueman* v. *Loder* (1840), 11 Ad. & El. 589 (tallow trade); *Gibson* v. *Crick* (1862), 1 H. & C. 142 (shipping brokers); *Barrow* v. *Dyster* (1884), 13 Q. B. D. 635 (liability of broker for undisclosed principal).

(*h*) *Fawkes* v. *Lamb* (1862), 31 L. J. (Q. B.) 98, where a written contract

SECT. 2. Admission of Evidence of Usage to Annex Terms.

goods (*i*), and also in the case of contracts between landlord and tenant (*k*).

Application of rules.

**485.** The foregoing rules of construction and as to the admission of evidence of usages apply to all manner of valid usages and to all contracts, whether between commercial persons, or between persons engaged in trade, or between persons occupying positions in any department of business life; they also apply to all local usages and customs of the country which are not immemorial customs (*l*).

SECT. 3.—*Admission of Evidence of Usage to Explain Terms.*

To explain terms.

**486.** Evidence of usage may be admitted to explain terms which are *primâ facie* unambiguous (*m*); and to supply, as it were, the mercantile dictionary in which to find the mercantile meaning of the words which are used (*n*). Mercantile contracts are very commonly framed in a language peculiar to merchants; the intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large. Evidence, therefore, of mercantile usage is admitted in order to expound the language and arrive at its true meaning; and in construing a contract among merchants, tradesmen or other persons similarly related to each other, the evidence will not be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is that words perfectly unambiguous in their ordinary meaning are used by the contracting parties in a different sense (*o*). Although parol evidence is not admissible to contradict a document, the terms of which have no other meaning than their ordinary meaning and acceptation, yet if the parties have used terms, which bear not only an ordinary meaning, but also one peculiar to the department of trade or business to which the contract relates, it is obvious that due effect would not be given to the intention if the terms were interpreted according to their ordinary and not according to their peculiar signification (*p*). Therefore, whenever such a question has come before the courts it has always been held that where

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was silent as to any allowance of warehouse rent, and evidence was rejected to prove a parol agreement to exclude the usual allowance.

(*i*) *Yates* v. *Pym* (1816), 6 Taunt. 446; *Ford* v. *Yates* (1841), 2 Man. & G. 549.

(*k*) *Boraston* v. *Green* (1812), 16 East, 71; *Webb* v. *Plummer* (1819), 2 B. & Ald. 746; *Roberts* v. *Barker* (1833), 1 Cr. & M. 808.

(*l*) *Smith* v. *Wilson* (1832), 3 B. & Ad. 728, *per* PARKE, B., at p. 733; *Hutton* v. *Warren* (1836), 1 M. & W. 466, *per* PARKE, B., at p. 475; *Grant* v. *Maddox* (1846), 15 M. & W. 737, *per* ALDERSON, B., at p. 745. See also p. 257, *ante*.

(*m*) *Gulf Line* v. *Laycock* (1901), 7 Com. Cas. 1, *per* KENNEDY, J., at p. 4; *Bowes* v. *Shand* (1877), 2 App. Cas. 455, *per* Lord CAIRNS, L.C., at p. 468.

(*n*) *Bowes* v. *Shand*, *supra*.

(*o*) *Brown* v. *Byrne* (1854), 3 E. & B. 703, *per* COLERIDGE, J., at p. 715; *Buckle* v. *Knoop* (1867), L. R. 2 Exch. 125, *per* KELLY, C.B., at p. 129; *Bowes* v. *Shand*, *supra*, *per* Lord CAIRNS, L.C., at p. 462; *Re North Western Rubber Co., Ltd., and Hüttenbach & Co.*, [1908] 2 K. B. 907, C. A., *per* BUCKLEY, L.J., at p. 923.

(*p*) *Myers* v. *Sarl* (1860), 3 E. & E. 306, *per* COCKBURN, C.J., at p. 315.

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the terms of the contract under consideration have, besides their ordinary and popular sense, also a peculiar meaning, the parties who have drawn up the contract with reference to some peculiar department of trade or business must have intended to use the words in the peculiar sense. This is but an application of the well-known rule that the interpretation of contracts must be governed by the intention of the parties; and, from the nature of the case, the peculiar meaning of the terms used can be discovered only by means of parol evidence (*q*).

Words used *primâ facie* in peculiar meaning.

**487.** Where it is shown that a term or phrase in a written contract bears a peculiar meaning in the trade or business to which the contract relates, that meaning is *primâ facie* to be attributed to it, unless upon construction of the whole contract enough appears, either from express words or by necessary implication, to show that the parties did not intend that meaning to prevail (*r*). Thus, evidence of a usage has been admitted to show that the word "thousand" as applied to rabbits in a lease of a warren meant one thousand two hundred (*s*); to show the meaning of the word "weeks" as used in a contract for the engagement of an actress (*t*); of the word "months" in a charterparty (*u*); of the words "next two months" in the iron trade (*v*); of the word "days" in a bill of lading (*w*); the meaning of and the distinction between the words "good" and "fine" in the barley trade (*x*); the meaning of the words "running days" in a charterparty (*y*); of the expression "no St. Lawrence" in a policy of insurance (*z*); what latitude is given by the word "about" (*a*); the meaning of the word "level" as understood by miners in the district (*b*); what "Liverpool" meant in a charterparty as a port of arrival (*c*); that the term "particular average" did not include expenses incurred in saving insured property (*d*); that the term "Gulf of Finland" was treated by merchants as part of the Baltic (*e*); what the word "wet" meant as applied to oil (*f*); that "pimento" did not mean sea-damaged pimento (*g*); the meaning of the word "statuary" in the carrying

(*q*) *Myers* v. *Sarl* (1860), 3 E. & E. 306, *per* COCKBURN, C.J., at p. 315, *per* HILL, J., at p. 318, *per* BLACKBURN, J., at p. 319.
(*r*) *Myers* v. *Sarl*, *supra*, *per* BLACKBURN, J., at p. 319; see also *Wilkins* v. *Wood* (1848), 17 L. J. (Q. B.) 319.
(*s*) *Smith* v. *Wilson* (1832), 3 B. & Ad. 728.
(*t*) *Grant* v. *Maddox* (1846), 15 M. & W. 737; see also *Myers* v. *Sarl*, *supra*.
(*u*) *Jolly* v. *Young* (1847), 1 Esp. 186; see *Simpson* v. *Margetson* (1847), 11 Q. B. 23; *Bissell* v. *Beard* (1873), 28 L. T. 740.
(*v*) *Bissell* v. *Beard*, *supra*.
(*w*) *Cochran* v. *Retberg* (1800), 3 Esp. 121.
(*x*) *Hutchison* v. *Bowker* (1839), 5 M. & W. 535.
(*y*) *Neilsen* v. *Wait* (1885), 16 Q. B. D. 67, C. A.
(*z*) *Birrell* v. *Dryer* (1884), 9 App. Cas. 345.
(*a*) *Alcock* v. *Leeuw* (1883), Cab. & El. 98.
(*b*) *Clayton* v. *Gregson* (1836), 5 Ad. & El. 302 (a case of a lease).
(*c*) *Norden Steam Co.* v. *Dempsey* (1876), 1 C. P. D. 654.
(*d*) *Kidston* v. *Empire Insurance Co.* (1866), L. R. 1 C. P. 535.
(*e*) *Uhde* v. *Walters* (1811), 3 Camp. 16.
(*f*) *Warde* v. *Stuart* (1856), 1 C. B. (N. S.) 88.
(*g*) *Jones* v. *Bowden* (1813), 4 Taunt. 847.

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trade (*h*); that "cider" meant the juice of apples pressed from the fruit and not the finished beverage of that name (*i*); to explain the expression "to load in regular turn" (*j*); to show the meaning of the words "in turn to deliver" (*k*) and "about" a certain quantity of barrels (*l*) as used in certain charterparties; that the word "furniture" in a policy of marine insurance included provisions carried for the use of the crew (*m*); to explain the expression "weekly account" used in a building agreement under seal, as understood in the building trade (*n*); to show that "stock" meant sound sheep (*o*); and to show that "net proceeds" meant proceeds exclusive of bad debts (*p*).

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# Part VIII.—Persons Bound by Usage.

Persons bound.

**488.** As a general rule a person who is ignorant of the existence of a usage is not bound by it (*q*). But a person may be presumed, notwithstanding an allegation of his ignorance, to have known of the usage when he entered into the contract (*r*). Whenever a man

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(*h*) *Sutton* v. *Ciceri* (1890), 15 App. Cas. 144.
(*i*) *Studdy* v. *Saunders* (1826), 8 Dow. & Ry. (K. B.) 403.
(*j*) *Hudson* v. *Clementson* (1856), 18 C. B. 213.
(*k*) *Robertson* v. *Jackson* (1845), 2 C. B. 412.
(*l*) *Alcock* v. *Leeuw* (1883), Cab. & El. 98; see also *Moore* v. *Campbell* (1854), 10 Exch. 323 (usage of hemp brokers).
(*m*) *Brough* v. *Whitmore* (1791), 4 Term Rep. 206.
(*n*) *Myers* v. *Sarl* (1860), 3 E. & E. 306.
(*o*) *Jones* v. *Bowden* (1813), 4 Taunt. 847, *per* HEATH, J., at p. 853.
(*p*) *Caine* v. *Horsfall* (1847), 1 Exch. 519.
(*q*) *Gabay* v. *Lloyd* (1825), 3 B. & C. 793; *Bartlett* v. *Pentland* (1830), 10 B. & C. 760, *per* Lord TENTERDEN, at p. 770; *Rushforth* v. *Hadfield* (1806), 7 East, 224; *Sweeting* v. *Pearce* (1861), 9 C. B. (N. S.) 534, Ex. Ch., *per* WIGHTMAN, J., at p. 536; *Scott* v. *Irving* (1830), 1 B. & Ad. 605: *Hathesing* v. *Laing* (1873), L. R. 17 Eq. 92, where a shipowner was held not bound by the local usage of merchants in Bombay; *Re Florence, Ex parte Wingfield* (1879), 10 Ch. D. 591, C. A., *per* JESSEL, M.R., at pp. 593, 594. See also *Matvieff* v. *Crosfield* (1903), 8 Com. Cas. 120.
(*r*) Thus in *Noble* v. *Kennaway* (1780), 2 Doug. (K. B.) 512, Lord MANSFIELD said: "Every underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it he ought to inform himself." See also *Buckle* v. *Knoop* (1867), L. R. 2 Exch. 125, *per* KELLY, C.B., at p. 129; *Mollett* v. *Robinson* (1872), L. R. 7 C. P. 84, Ex. Ch., *per* BLACKBURN, J., at p. 111; *Rushforth* v. *Hadfield*, *supra*, *per* Lord ELLENBOROUGH, C.J., at p. 228, *per* GROSE, J., at p. 230. As to the duty of every person affected by a well-established usage to inform himself of it, see *Re Couston, Ex parte Watkins* (1873), 8 Ch. App. 520, *per* Lord SELBORNE, L.C., at pp. 530, 531; *Russian Steam-Navigation Co.* v. *Silva* (1863), 13 C. B. (N. S.) 610, *per* WILLES, J., at p. 617; *Sewell* v. *Corp* (1824), 1 C. & P. 392, *per* BEST, C.J., at p. 393. See also *Pollock* v. *Stables* (1848), 12 Q. B. 765, where a person employing a stockbroker on the Leeds Stock Exchange was held bound by the usage of that market, although it was not shown that he was aware of that usage; *Plaice* v. *Allcock* (1866), 4 F. & F. 1074; *Newall* v. *Royal Exchange Shipping Co.* (1885), 33 W. R. 868, C. A., at pp. 868, 869; *Holderness* v. *Collinson* (1827), 7 B. & C. 212, *per* BAYLEY, J., at p. 216 (an alleged usage as to wharfingers' lien in Hull).

undertakes to perform a duty, he undertakes to perform it with a reasonable degree of care and skill, and where the performance has reference to a particular trade that necessarily involves an obligation upon him to make himself acquainted by due inquiry with the usages of that trade (*s*).

Notoriety.

**489.** The question whether a person is bound by a usage depends upon the degree of notoriety which that usage has acquired (*t*). If a usage, whether it be a commercial usage or one of a particular trade or of persons bound by particular contractual obligations in respect of land, has become so general and notorious within its particular sphere that all persons dealing within its sphere can easily ascertain it, then those persons are presumed to have been aware of it when they entered into the contract, and will be deemed to have submitted to be bound by it, although they allege that they were ignorant of its existence (*u*).

Particular markets etc.

**490.** It is now thoroughly established that a person who deals in a market is bound to inquire what its usages are, and that those who deal with him have a right to hold him bound by them to the same extent as a person would have been bound who belonged to the place (*a*). Such a person under these circumstances is precluded from setting up, as against the persons he dealt with, his ignorance of that which he ought to have known (*b*), and must be taken to deal according to the usage of the market (*c*).

A man who directs another person to make a contract at a particular place must be taken as having intended that

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(*s*) See *Russian Steam-Navigation Co.* v. *Silva* (1863), 13 C. B. (N. S.) 610, *per* WILLES, J., at p. 617.

(*t*) See *Holderness* v. *Collinson* (1827), 7 B. & C. 212, at p. 216, where BAYLEY, J., said "where a usage is general, and prevails to such an extent that a party contracting . . . must be supposed to be conusant of it, then he will be bound by the terms of that usage"; *Rushforth* v. *Hadfield* (1806), 7 East, 224, *per* Lord ELLENBOROUGH, C.J., at p. 228, and *per* GROSE, J., at p. 230; *Nelson* v. *Dahl* (1879), 12 Ch. D. 568, C. A., *per* JESSEL, M.R., at p. 575.

(*u*) See *Grissell* v. *Bristowe* (1868), L. R. 3 C. P. 112, *per* BOVILL, C.J., at p. 128. This case was reversed on appeal (1868), L. R. 4 C. P. 36, Ex. Ch., where, however, COCKBURN, C.J., at p. 47, said that although it was unnecessary in the view the court had taken of the case to decide the question, the court would have inferred that the plaintiff either had knowledge of the usage beforehand or had subsequently ratified the contract. See also *Mollett* v. *Robinson* (1872), L. R. 7 C. P. 84, Ex. Ch., *per* BLACKBURN, J., at p. 111; *Buckle* v. *Knoop* (1867), L. R. 2 Exch. 125, *per* KELLY, C.B., at p. 129; affirmed *ibid.*, p. 333, Ex. Ch.; *Pollock* v. *Stables* (1848), 12 Q. B. 765; *Rainy* v. *Vernon* (1840), 9 C. & P. 559, where the question left to the jury by Lord DENMAN, C.J., was whether a usage of the auctioneer's trade to charge a commission in certain events was so notorious that the defendant, who had engaged an auctioneer, must be taken to have known of it; *Holderness* v. *Collinson*, *supra*, *per* BAYLEY, J., at p. 216; *Rushforth* v. *Hadfield*, *supra*, *per* Lord ELLENBOROUGH, C.J., at p. 228, and *per* GROSE, J., at p. 230.

(*a*) See *Mollett* v. *Robinson*, *supra*, *per* BLACKBURN, J., at p. 111. See also *Bayliffe* v. *Butterworth* (1847), 1 Exch. 425, *per* ALDERSON, B., at p. 429; *Pollock* v. *Stables*, *supra*.

(*b*) See *Mollett* v. *Robinson*, *supra*.

(*c*) *Bayliffe* v. *Butterworth*, *supra*, *per* ALDERSON, B., at p. 429. See also *Pollock* v. *Stables*, *supra*; *Duncan* v. *Hill* (1871), L. R. 6 Exch. 255, *per* KELLY, C.B., at pp. 266, 267, which case was, however, reversed on appeal (see *Duncan* v. *Hill* (1873), L. R. 8 Exch. 242, Ex. Ch.).

PART VIII. Persons Bound by Usage.

the contract should be made in accordance with the usage of that place (*d*).

A person who employs a broker must be supposed to give the latter authority to act as other brokers do; it does not matter whether the employer was or was not himself acquainted with the rules by which brokers are bound (*e*). Thus a person employing on the Stock Exchange a broker who is notoriously a broker must be taken to have authorised the latter to act in obedience to the rules of the Stock Exchange (*f*).

If, however, a person employs a broker to transact business for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages only in so far as they merely regulate the mode of performing the contracts and do not change their intrinsic character (*g*).

Particular professions etc.

**491.** If there is a general usage applicable to any particular profession, parties employing an individual engaged in that profession are supposed to deal with him according to that usage (*h*).

On the other hand, if the usage is in some respect lacking in notoriety, persons ignorant of it are not bound by it, that is to say, strangers to its sphere, not cognisant of it, are not bound (*i*). Thus a usage of a particular place or of a particular class of persons cannot bind other persons unless they are acquainted with the usage

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(*d*) *Bayliffe* v. *Butterworth* (1847), 1 Exch. 425, *per* ALDERSON, B., at p. 429; see also *Harker* v. *Edwards* (1887), 57 L. J. (Q. B.) 147, C. A.

(*e*) *Sutton* v. *Tatham* (1839), 10 Ad. & El. 27, *per* LITTLEDALE, J., at p. 30; see also *Pollock* v. *Stables* (1848), 12 Q. B. 765. But compare *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802, at p. 838; see also *Harker* v. *Edwards*, *supra*.

(*f*) *Sutton* v. *Tatham*, *supra*, *per* Lord DENMAN, C.J., at p. 29; see also *Forget* v. *Baxter*, [1900] A. C. 467, P. C., at p. 479; *Harker* v. *Edwards*, *supra*. See title STOCK EXCHANGE.

(*g*) See *Robinson* v. *Mollett*, *supra*, *per* Lord CHELMSFORD, at p. 836.

(*h*) See *Sewell* v. *Corp* (1824), 1 C. & P. 392, *per* BEST, C.J., at p. 393 (an alleged usage of veterinary surgeons).

(*i*) *Gabay* v. *Lloyd* (1825), 3 B. & C. 793 (an action on a policy of insurance). It was found in a special verdict that a usage with regard to such policies prevailed amongst the underwriters subscribing policies at Lloyd's Coffee-house, and that the policy in question was effected there; but it was not found that the plaintiff was in the habit of effecting policies at that place. The court held that this usage, being merely a usage of a particular house, was not sufficient to bind the plaintiff.

The following are cases where persons, unaware of the existence of the usage, have been held not bound by it, upon the ground that the usage, in some respect or other, lacked notoriety:—*Gabay* v. *Lloyd*, *supra*; *Re Jones*, *Ex parte Lovering* (No. 2) (1874), 9 Ch. App. 621 (bankruptcy); *Re Matthews*, *Ex parte Powell* (1875), 1 Ch. D. 501, C. A. (an alleged usage as to hotel keepers hiring their furniture); *Re Hill* (1875), 1 Ch. D. 503, n., C. A., where an alleged usage for cab proprietors to hire their cabs was held not sufficiently well known by persons likely to become their creditors, so as to exclude the doctrine of reputed ownership; *Perry* v. *Barnett* (1885), 15 Q. B. D. 388, C. A., where the defendant was ignorant of the usage of the London Stock Exchange with regard to dealings in shares of banking companies, and did not know that the purchasing broker was by such usage bound to perform a contract for the purchase of banking shares, though void at law under the Banking Companies (Shares) Act, 1867 (30 & 31 Vict. c. 29); *Harker* v. *Edwards* (1887), 57 L. J. (Q. B.) 147, C. A. (a person employing a broker on the London Stock Exchange

and adopt it (*k*), or if the usage is confined to part of a trade, other persons in that trade are not bound by it (*l*). Similarly a usage which only exists within a particular market cannot bind persons unaware of it who do not deal in that particular market (*m*).

Unreasonable usages.

**492.** No usage, however notorious and general, will bind a person who was ignorant of it when he entered into the contract, unless the usage be both reasonable (*n*) and legal (*o*); for to that extent only can such a person be assumed to have acquiesced in the usage, and to have submitted to be bound by it (*p*).

The courts have always taken upon themselves to consider whether a usage is or is not within the bounds of reason, and if the usage is unreasonable they will not recognise it as binding on people who do not know it and who have not consented to act upon it (*q*).

A person may agree to be bound by an unreasonable usage; but he is only bound if, when he entered upon the dealing, the usage was made known to him, and he then agreed to be bound by it (*r*).

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authorises the latter to make a contract of sale in accordance with the rules and usages in force, unless they are either unreasonable or illegal, and not known to the principal); *Smith* v. *Reynolds* (1891), 8 T. L. R. 137; (1892), *ibid.*, 391, C. A. (also a case of a usage of the London Stock Exchange); *Blackburn* v. *Mason* (1893), 68 L. T. 510, C. A., at p. 511, where an alleged usage among stockbrokers that a member of the London Stock Exchange, who has sold shares on the instructions of a country broker acting for an undisclosed principal, is entitled to set-off against the price of the shares a debt due to him from the country broker in respect of previous Stock Exchange transactions, was held unreasonable, and therefore not binding upon the principal of the country broker, unless the principal knew of the alleged usage and agreed to be bound by it. See title STOCK EXCHANGE.

(*k*) *Bartlett* v. *Pentland* (1830), 10 B. & C. 760, *per* Lord TENTERDEN, C.J., at p. 770.

(*l*) *Gabay* v. *Lloyd* (1825), 3 B. & C. 793, at p. 797.

(*m*) *Re Goetz, Jonas & Co., Ex parte The Trustee*, [1898] 1 Q. B. 787, C. A., *per* A. L. SMITH, L.J., at p. 795.

(*n*) *Neilson* v. *James* (1882), 9 Q. B. D. 546, C. A., *per* BRETT, L.J., at p. 552; *Leuckhart* v. *Cooper* (1836), 3 Bing. (N. C.) 99 (alleged usage for public warehouse keepers in London to have a general lien on all goods from time to time housed in their warehouses for all moneys due from the merchants intrusting their goods to them in respect of expenses incurred by the warehouse keepers was held unreasonable and not binding upon foreign merchants); *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802; *Perry* v. *Barnett* (1885), 15 Q. B. D. 388, C. A., *per* BOWEN, L.J., at p. 397; *Sweeting* v. *Pearce* (1861), 30 L. J. (C. P.) 109, Ex. Ch., *per* WIGHTMAN, J., at p. 110; *Duncan* v. *Hill* (1873), L. R. 8 Exch. 242, Ex. Ch., *per* BLACKBURN, J., at p. 248. See also *Scott* v. *Irving* (1830), 1 B. & Ad. 605, *per* Lord TENTERDEN, C.J., at p. 612; *Bottomley* v. *Forbes* (1838), 5 Bing. (N. C.) 121 (alleged usage as to mode of measurement of cargoes from Bombay); *Ropner & Co.* v. *Stoate, Hosegood & Co.* (1905), 92 L. T. 328.

(*o*) *Perry* v. *Barnett*, *supra*, at p. 395; *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802; *Neilson* v. *James*, *supra*, *per* BRETT, L.J., at p. 552.

(*p*) *Neilson* v. *James*, *supra*; *Perry* v. *Barnett*, *supra*, *per* BOWEN, L.J., at p. 397.

(*q*) *Perry* v. *Barnett*, *supra*, *per* BRETT, M.R., at p. 393; *Robinson* v. *Mollett*, *supra*.

(*r*) *Blackburn* v. *Mason* (1893), 68 L. T. 510, C. A., *per* Lord ESHER, M.R., at p. 511. See also *Scott* v. *Irving* (1830), 1 B. & Ad. 605, *per* Lord TENTERDEN, C.J., at p. 612.

PART VIII. Persons Bound by Usage.

One-sided usages.

**493.** When a considerable number of men of business carry on one side of a particular business they are apt to set up a usage which acts very much in favour of their side of the business. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a usage; but if on dispute before a legal forum it is found that they are endeavouring to enforce some rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the court has always determined that such a usage, if sought to be enforced against a person in fact ignorant of it, is unreasonable, contrary to law, and void (*s*).

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# Part IX.—Proof of Usage.

## SECT. 1.—*In General.*

Proof.

**494.** The question as to the existence of a custom is a question of fact, and it is necessary to prove the custom in each case, until eventually it becomes so well understood that the courts take judicial notice of it (*a*). Every usage, of which the courts do not take judicial notice, must be clearly shown to exist (*b*).

**495.** A usage is proved by the oral evidence of persons who become cognisant of its existence by reason of their occupation, trade, or position (*c*). The evidence must be clear and convincing; it must also be consistent (*d*).

In order to prove a particular trade usage alleged to be carried

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(*s*) *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802, *per* BRETT, J., at p. 818.

(*a*) *Moult* v. *Halliday*, [1898] 1 Q. B. 125, *per* CHANNELL, J., at p. 129; *Goodwin* v. *Robarts* (1875) L. R. 10 Exch. 337, Ex. Ch.; (1876) 1 App. Cas. 476; *Nelson* v. *Dahl* (1879), 12 Ch. D. 568, C. A., *per* JESSEL, M.R., at p. 575; see also *Postlethwaite* v. *Freeland* (1880), 5 App. Cas. 599, *per* Lord BLACKBURN, at p. 616.

(*b*) *Moult* v. *Halliday*, *supra*, *per* CHANNELL, J., at p. 130; *Coles* v. *Bristowe* (1868), 4 Ch. App. 3, *per* Lord CAIRNS, L.C., at p. 11.

(*c*) See, for instance, *Re Matthews*, *Ex parte Powell* (1875), 1 Ch. D. 501, C. A. (furniture dealers); *Murray* v. *Currie* (1836), 7 C. & P. 584 (land agents); *Stewart* v. *Aberdein* (1838), 4 M. & W. 211 (insurance brokers); *Cohen* v. *Paget* (1814), 4 Camp. 96 (ship brokers); *Eicke* v. *Meyer* (1813), 3 Camp. 412, where a usage of London brokers was proved by "a great number of brokers and merchants"; *Rainy* v. *Vernon* (1840), 9 C. & P. 559, where three auctioneers proved a usage of the auctioneers' trade; *Plaice* v. *Allcock* (1866), 4 F. & F. 1074 (bleachers and hosiers); *Bottomley* v. *Forbes* (1838), 5 Bing. (N. C.) 121, where a witness who was at Bombay at the time of shipment proved a usage at that place as to measurement of the cargo.

(*d*) *Bowes* v. *Shand* (1877), 2 App. Cas. 455; *Levitt* v. *Hamblett*, [1901] 2 K. B. 53, C. A., *per* COLLINS, L.J., at p. 66; *Re Hill* (1875), 1 Ch. D. 503, n., C. A., *per* MELLISH, L.J., at p. 504, n.; and see *Willans* v. *Ayers* (1877), 3 App. Cas. 133, P. C., at p. 146 (a considerable discrepancy in the evidence as to the nature of the alleged usage led the court to the conclusion that the usage was not universally admitted by those engaged in or conversant with the particular trade).

on at a particular place, the evidence of persons carrying on the same trade in another place may be called to show that the particular trade is carried on there, provided the two places are in the same vicinity, and there is shown to be an interchange of the trade between them (*e*).

A usage is not proved by merely bringing the person interested in establishing its existence to give oral evidence of its existence unsupported by any other evidence (*f*).

Universal acquiescence.

**496.** In order to prove a usage in a particular trade it must be shown that the usage is certain and reasonable and so universally acquiesced in that everybody engaged in the trade knows of it, or might know if he took the pains to inquire (*g*). If the evidence tends to show that the alleged usage is in a high degree unreasonable, this fact will be of weight in considering whether or not the alleged usage does, in fact, exist (*h*).

Opinion.

**497.** The evidence of witnesses, in order to prove the existence of a usage, must amount to something more than mere opinion; it must establish the fact of the existence of the usage, and provide instances of the usage having been acted upon; otherwise the testimony will be of little weight (*i*). In order to establish a mercantile usage it is necessary, not only to show that a large number of influential people at the place where it is alleged to exist

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(*e*) *Plaice* v. *Allcock* (1866), 4 F. & F. 1074 (witnesses carrying on the trade of bleachers at Loughborough were called to prove the existence of a usage of the trade of bleachers in Nottingham). As to the nature of the evidence necessary to prove or disprove the existence of a usage, see, generally, *The Harriot* (1842), 1 Wm. Rob. 439 (usage of South Sea whalers to render assistance without claiming salvage); *Dickenson* v. *Lano* (1860), 2 F. & F. 188 (Portland stone quarry trade); *Re Couston, Ex parte Watkins* (1873), 8 Ch. App. 520 (usage in the Liverpool wine and spirit trade); *Re Matthews, Ex parte Powell* (1875), 1 Ch. D. 501, C. A. (usage of hotel keepers and furniture dealers); *Abbott* v. *Bates* (1874), 43 L. J. (C. P.) 150 (usage of horse trainers); *Re Witt, Ex parte Shubrook* (1876), 2 Ch. D. 489, C. A. (usage as to packer's lien); *Willans* v. *Ayers* (1877), 3 App. Cas. 133, P. C. (an alleged usage as to bills of exchange); *Re Florence, Ex parte Wingfield* (1879), 10 Ch. D. 591, C. A. (usage of horse dealers to have horses upon their premises for sale or return); *Dent* v. *Nickalls* (1874), 22 W. R. 218 (alleged usage of the Stock Exchange); *Knight* v. *Cotesworth* (1883), Cab. & El. 48, at p. 51 (marine insurance); *Stewart* v. *Aberdein* (1838), 4 M. & W. 211 (marine insurance); *Re Catford, Carr* v. *Ford* (1894), 71 L. T. 584 (usage of Bristol warehousemen to have a general lien); *Wildy* v. *Stephenson* (1882), Cab. & El. 3 (Stock Exchange); *Levitt* v. *Hamblett*, [1901] 2 K. B. 53, C. A. (London Stock Exchange); *Gill* v. *Shepherd & Co.* (1902), 8 Com. Cas. 48 (Stock Exchange); *Sea Steamship Co.* v. *Price, Walker & Co.* (1903), 8 Com. Cas. 292 (an alleged usage that steamers discharged at a certain rate are properly discharged, whatever may be their size); *Ropner & Co.* v. *Stoate, Hosegood & Co.* (1905), 92 L. T. 328 (alleged usage restricting the rate of delivery of grain cargoes to 500 tons *per diem*).

(*f*) *Re Witt, Ex parte Shubrook, supra, per* MELLISH, L.J., at p. 492.

(*g*) *Plaice* v. *Allcock, supra.*

(*h*) *Bottomley* v. *Forbes* (1838), 5 Bing. (N. C.) 121, *per* TINDAL, C.J., at p. 128.

(*i*) *Lewis* v. *Marshall* (1844), 7 Man. & G. 729, 743; see also *Tucker* v. *Linger* (1882), 21 Ch. D. 18, C. A., *per* JESSEL, M.R., at p. 34, and *per* COTTON, L.J., at p. 38.

SECT. 1. In General.

have agreed that it would be a good thing to have such a usage, but also that such an agreement has, in fact, been acted upon; because unless it is acted on no one will challenge it (*k*).

Disproof.

**498.** Where it is sought to establish the existence of a usage, the other party may adduce evidence tending to prove the non-existence of the usage by producing witnesses who from their profession, trade, or position would be bound to have heard of the usage if it in fact existed, and who state that they have never heard of it (*l*); or he may adduce evidence to show that in the particular transaction the parties did not act upon the usage (*m*); or to show that, although there may have been such a usage as is alleged, another inconsistent usage has sprung up (*n*). But the non-existence of a usage cannot be proved by merely calling the party interested in denying its existence to say that he never heard of its existence (*o*).

Subsequent proof.

**499.** Where the evidence tendered in support of a usage is not sufficient to establish it, the dismissal of the action upon the ground of the failure of proof of the usage does not necessarily disprove its existence or prejudice the person seeking to establish it, so as to prevent him from establishing the existence and validity of the usage in any subsequent action in respect of a similar transaction (*p*).

### SECT. 2.—*Judicial Notice of Usages.*

Judicial notice.

**500.** A commercial or other usage may be so often proved in courts of law that the courts will take judicial notice of it (*q*). This is done in order to prevent useless expense, as it is unnecessary to require the parties to prove by a large number of witnesses a usage which has been proved over and over again (*r*). As regards the necessity of proof, usages pass through certain stages. There is the primary stage when the particular usage must be proved with certainty and precision; there is the secondary stage when the court has become to some degree familiar with the usage, and when slight evidence only is required to establish it; and there is the final stage when

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(*k*) *Sea Steamship Co.* v. *Price, Walker & Co.* (1903), 8 Com. Cas. 292, *per* KENNEDY, J., at p. 295.

(*l*) *Bourne* v. *Gatliffe* (1841), 3 Man. & G. 643, *per* ALDERSON, B., at p. 684. See, for instance, *Levitt* v. *Hamblet*, [1901] 2 K. B. 53, C. A., at p. 66, where the official assignee of the London Stock Exchange was called to prove the non-existence of an alleged usage of the Stock Exchange.

(*m*) *Bourne* v. *Gatliffe, supra, per* ALDERSON, B., at p. 684.

(*n*) *Moult* v. *Halliday*, [1898] 1 Q. B. 125, *per* CHANNELL, J., at p. 130.

(*o*) *Re Witt, Ex parte Shubrook* (1876), 2 Ch. D. 489, C. A., *per* MELLISH, L.J., at p. 492. As to the nature of evidence necessary to prove want of knowledge of the existence of an alleged usage, see *Matvieff* v. *Crosfield* (1903), 8 Com. Cas. 120, *per* KENNEDY, J., at p. 123.

(*p*) *Beckhuson and Gibbs* v. *Hamblett*, [1901] 2 K. B. 73, C. A.

(*q*) *Re Matthews, Ex parte Powell* (1875), 1 Ch. D. 501, C. A., *per* MELLISH, L.J., at p. 506; *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144, *per* BIGHAM, J., at pp. 155, 156; *Brandao* v. *Barnett* (1846), 12 Cl. & Fin. 787, H. L., *per* Lord CAMPBELL, L.C., at p. 805.

(*r*) *Re Matthews, Ex parte Powell, supra.*

SECT. 2. Judicial Notice of Usages.

the court takes judicial notice of the usage, and evidence is not required (*s*).

Degree of proof of usage.

**501.** The courts have not laid down any guiding rule as regards the exact number of times a usage must be proved before judicial notice of it will be taken (*t*). It would seem that the mere proof and establishment of a valid usage once only does not of itself entitle a person in a subsequent action to dispense with proof of the usage; but, on the other hand, where there are several reported cases in which the usage has been established, this fact of itself will cause the court to take judicial notice of the usage (*a*). The reported cases must not be contradictory, but must appear to the court to be sufficient to establish that the alleged usage has been frequently proved (*b*).

Law merchant.

**502.** The courts will take judicial notice of those usages which are embodied in the law merchant (*c*). These usages are the general law of the land and part of the common law; and for this reason they ought not to be left to the jury after they have been judicially noticed (*d*).

Usages judicially noticed.

**503.** Judicial notice has been taken of the usage of drivers of vehicles upon public roads to keep to the left (*e*); of persons riding on horseback to keep to the same side (*f*); of the general practice of conveyancers (*g*); of the usage as to the mode of calculating average by deducting a fixed amount for repairs (*h*); of the usage of bankers to have a general lien (*i*); of the usage amongst shipowners and

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(*s*) *Moult* v. *Halliday*, [1898] 1 Q. B. 125, *per* CHANNELL, J., at pp. 129, 130. It is apprehended, however, that in every case where it is intended to rely upon a usage, the party relying upon its existence should be prepared with evidence to establish it, although the particular usage appears to have been judicially noticed in reported cases. Judicial notice of a usage should not be relied upon, owing to the transitory nature of the notoriety of usages; for a usage formerly notorious may give place to another and become the exception rather than the rule; see *Ropner & Co.* v. *Stoate Hosegood & Co.* (1905), 92 L. T. 328, *per* CHANNELL, J., at p. 332; and *Moult* v. *Halliday*, *supra*.

(*t*) The rule which formerly existed that each court took notice of usages and customs held by or certified to it, no longer holds good. See Stephen, Evidence, art. 58 (4), note; and title EVIDENCE.

(*a*) *Re Parker, Ex parte Turquand* (1885), 14 Q. B. D. 636, C. A., *per* BRETT, M.R., at p. 645: "The custom has been so often proved that the courts will take judicial notice of it."

(*b*) *Re Matthews, Ex parte Powell* (1875), 1 Ch. D. 501, C. A., *per* MELLISH, L.J., at p. 507.

(*c*) See *Brandao* v. *Barnett* (1846), 12 Cl. & Fin. 787, H. L., *per* Lord CAMPBELL, at p. 805; *Mogadara* v. *Holt* (1691), 1 Show. 317; *Lethulier's Case* (1692), 2 Salk. 443, *per* HOLT, C.J.; *Edie* v. *East-India Co.* (1761), 2 Burr. 1216, *per* FOSTER, J., at p. 1226. As to the law merchant, see p. 259, *ante*.

(*d*) *Edie* v. *East-India Co.*, *supra*.

(*e*) *Leame* v. *Bray* (1803), 3 East, 593. And see Motor Cars (Use and Construction) Order, 1904, art. iv. (3); Statutory Rules and Orders, 1904, p. 520, which appear to give statutory recognition to the usage.

(*f*) *Turley* v. *Thomas* (1837), 8 C. & P. 103.

(*g*) *Re Rosher, Rosher* v. *Rosher* (1884), 53 L. J. (CH.) 722.

(*h*) *Poingdestre* v. *Royal Exchange Corporation* (1826), Ry. & M. 378.

(*i*) *Davis* v. *Bowsher* (1794), 5 Term Rep. 488; *Brandao* v. *Barnett* (1845), 12 Cl. & Fin. 787, H. L.; *London Chartered Bank of Australia* v. *White* (1879), 4 App. Cas. 413, P. C.

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underwriters that a declaration may be altered even after the loss is known (*k*); of a usage of packers to have a general lien over the goods of a customer (*l*); of the usage of underwriters as to the rules of average adjustment (*m*); of the usage of innkeepers to have a general lien over the chattels of guests deposited with the innkeeper (*n*); of the fact that by usage debentures to bearer are negotiable, although not so expressed upon their face (*o*); of the usage of hotel-keepers to hold their furniture on hire (*p*); and of a usage for booksellers to have in their shops books, which they do not own, to be sold on commission (*q*).

# Part X.—Miscellaneous Usages.

## SECT. 1.—*Usages of Particular Trades.*

Particular trades.

**504.** The following particular trade usages occur in reported cases (*r*). The majority have been actually established as existing at the time when the case in which each occurs was decided, and fulfilling all the requisite characteristics of a valid usage (*s*). Some, however, have been merely recognised or not contradicted, the case in which the particular usage was dealt with not involving a decision upon the existence or validity of the usage (*t*). Attempts

(*k*) *Stephens* v. *Australasian Insurance Co.* (1872), L. R. 8 C. P. 18.

(*l*) *Re Witt, Ex parte Shubrook* (1876), 2 Ch. D. 489, C. A.

(*m*) *Lohre* v. *Aitchison* (1878), 3 Q. B. D. 558, C. A., at p. 562.

(*n*) *Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, C. A.; *Turrill* v. *Crawley* (1849), 13 Q. B. 197; *Threfall* v. *Borwick* (1875), L. R. 10 Q. B. 210, Ex. Ch.

(*o*) *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144; *Sheffield (Earl)* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333; *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201.

(*p*) *Crawcour* v. *Salter* (1881), 18 Ch. D. 30, C. A.; *Re Parker, Ex parte Turquand* (1885), 14 Q. B. D. 636, C. A. Compare *Re Fowler, Ex parte Brooks* (1883), 23 Ch. D. 261, C. A. (no judicial notice of an alleged similar usage as to an ordinary householder); and *Re Jones, Ex parte Lovering* (No. 2) (1874), 9 Ch. App. 621.

(*q*) See *Whitfield* v. *Brand* (1847), 16 M. & W. 282, *per* PARKE, B., at p. 285, and *per* PLATT, B., at p. 287; *Re Thickbroom, Ex parte Greenwood* (1862), 6 L. T. 558. See also note (*b*) on p. 289, *post*.

(*r*) Every case in which a usage has been established cannot be regarded as an authority that the particular usage still continues, for a usage may go out of vogue in the course of a few years, or even in a shorter time if the circumstances change. See, for instance, *Ropner & Co.* v. *Stoate, Hosegood & Co.* (1905), 92 L. T. 328. On the other hand, many usages which are still recognised as valid were established many years ago. For instance, the usage in the legal profession for the lessor to pay for the counterpart lease was first established in 1837 (*Jenning* v. *Major* (1837), 8 C. & P. 61).

(*s*) As to these essential characterics, see p. 252, *ante*.

(*t*) See *Hathesing* v. *Laing* (1873), L. R. 17 Eq. 92, where it was held that an alleged usage as to the effect of a ship's mate's receipt for goods, if proved to exist, could not affect the persons against whom it was sought to establish it. The majority of cases where the courts have neither upheld nor contradicted the existence of a usage are cases where evidence of the usage has been tendered and rejected upon the ground that the usage was repugnant to the terms of a written contract and could not therefore be admitted. See, for instance,

to establish some usages have failed for want of proof, no decision being given on the question whether the alleged usage existed in point of fact, and whether, if borne out by evidence, it could be upheld in point of law (*a*). In other cases where usages have been alleged the courts have decided that not only did the parties seeking to establish them fail to prove them, but that the alleged usages, no matter how strong the evidence of their existence might have been, could not have existed at law (*b*).

Bleachers.

**505.** There is a valid usage in the bleaching trade to allow large discounts (*c*), and in the same trade, at Nottingham, for accounts to be made out quarterly and to be paid, at the bleacher's option, either at once or by a bill at three months (*d*).

Brewers and innkeepers.

**506.** A usage has been recognised among malting agents and brewers that where the amount of malt required by the brewers is very large, the brewer, and not the malting agent, provides the capital for the purchase of the barley (*e*). There is a usage in Devonshire that "cider" means the juice pressed from apples, and not the completed article of that name (*f*). An alleged usage between brewers and publicans that the deposit of a lease of licensed premises with the brewers constitutes a charge to which may be added any further advances in priority to subsequent incumbrances has been held invalid (*g*). There are also usages for hotel and inn keepers to hire their furniture (*h*) and all other articles necessary for the outfit of their hotels or inns (*i*), and for innkeepers having a posting business connected with their inns to hire carriages (*k*). A usage in London has been recognised, although it was doubted whether the evidence was sufficiently uniform to support it, on the transfer of a public-house to a new tenant, and on the first letting to a publican, that the tenant should give to the brewers by whom the house is supplied with malt liquors a first mortgage for the amount of the loan made by such brewers to him and to secure the book debt to become due

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*Reynolds & Co.* v. *Tomlinson*, [1896] 1 Q. B. 586; *Hayton* v. *Irwin* (1879), 5 C. P. D. 130, C. A.; *The Nifa*, [1892] P. 411.

(*a*) *Cooper* v. *Strauss & Co.* (1898), 14 T. L. R. 233.

(*b*) See *Gibbon* v. *Pease*, [1905] 1 K. B. 810, C. A., where an alleged usage for an architect to have property in plans was held unreasonable and no answer to the action.

(*c*) *Ex parte Aynsworth* (1799), 4 Ves. 677.

(*d*) *Plaice* v. *Allcock* (1866), 4 F. & F. 1074.

(*e*) *Harris* v. *Truman* (1881), 7 Q. B. D. 340; S. C. (1882), 9 Q. B. D. 264, C. A.

(*f*) *Studdy* v. *Saunders* (1826), 8 Dow. & Ry. (K. B.) 403.

(*g*) *Daun* v. *City of London Brewery Co.* (1869), L.R. 8 Eq. 155.

(*h*) *Re Matthews, Ex parte Powell* (1875), 1 Ch. D. 501, C. A.; *Crawcour* v. *Salter* (1881), 18 Ch. D. 30, C. A.; *Re Parker, Ex parte Turquand* (1885), 14 Q. B. D. 636, C. A.; *Re Fowler, Ex parte Brooks* (1883), 23 Ch. D. 261, C. A.; *Mullett* v. *Green* (1838), 8 C. & P. 382. See also title INNS AND INNKEEPERS.

(*i*) *Re Parker, Ex parte Turquand, supra.* But the existence of such a usage does not disentitle the general public to assume that an ordinary householder is the absolute owner of the furniture in his house; *Re Fowler, Ex parte Brooks* (1883), 23 Ch. D. 261, C. A.

(*k*) *Newport* v. *Hollings* (1827), 3 C. & P. 223.

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from the publican to the brewers, the further advances or book debt being limited to a particular sum (*l*).

Barley and malt trades.

**507.** A usage that the property in malt lying in a warehouse does not pass until the malt is remeasured has been alleged but not judicially sanctioned (*m*). There is no usage in the barley trade that "seed barley" means barley fit for malting purposes (*n*); nor in the distilling trade for distillers to hire vats and other articles used by them for the purpose of their trade (*o*).

Builders.

**508.** In the building trade usages have been established for architects to have their quantities made out by quantity surveyors, and for the successful contractor whose tender has been accepted to add the cost of making out the quantities to his contract (*p*); and that in the event of a tender being accepted, the builder whose tender is accepted is liable to the quantity surveyor for his fees, while if no tender be accepted the building owner or architect is liable (*q*); and a usage has been recognised that the words "weekly account" mean an account of the day-work expended in each week on the additions and alterations to a building and the materials used in such day-work (*r*). A usage as to reducing the brickwork in building brick walls where brick and stone are used in the same building has been admitted in evidence (*s*). But a usage that an architect is entitled to the property in the plans after the completion of the work has been held unreasonable (*t*); and there is no usage that a builder is liable to the architect for the latter's commission (*u*).

Coal merchants.

**509.** In the London coal trade there are usages for coal merchants hiring their barges on the Thames to paint their own names upon them (*x*); for coals to be supplied to the dealer daily during the course of a month, and for the dealer on the last day of the month to give a bill at two months for the coals supplied in that month (*y*); for coals to be sold at a credit of two months unless sold at the wharf when the sale is for cash (*a*); in the Newcastle coal trade for the vendors to have an option of 5 per cent. above or below the quantity of coal specified in the contract for sale (*b*); and in the iron and coal trades to hire horses from carting contractors (*c*).

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(*l*) *Menzies* v. *Lightfoot* (1871), L. R. 11 Eq. 459, 469.
(*m*) *Stonard* v. *Dunkin* (1810), 2 Camp. 344.
(*n*) *Carter* v. *Crick* (1859), 4 H. & N. 412.
(*o*) *Horn* v. *Baker* (1808), 9 East, 215, at p. 239.
(*p*) *Moon* v. *Witney Union Guardians* (1837), 3 Bing. (N. C.) 814.
(*q*) *North* v. *Bassett*, [1892] 1 Q. B. 333.
(*r*) *Myers* v. *Sarl* (1860), 3 E. & E. 306.
(*s*) *Symonds* v. *Lloyd* (1859), 6 C. B. (N. S.) 691.
(*t*) *Gibbon* v. *Pease*, [1905] 1 K. B. 810, C. A.
(*u*) *Locke* v. *Morter* (1885), 2 T. L. R. 121. See, generally, title BUILDING CONTRACTS ETC., Vol. III., pp. 313, 314.
(*x*) *Watson* v. *Peache* (1834), 1 Bing. (N. C.) 327.
(*y*) *Holl* v. *Hadley* (1828), 5 Bing. 54.
(*a*) *Boden* v. *French* (1851), 10 C. B. 886.
(*b*) *Société Anonyme L'Industrielle Russo-Belge* v. *Scholefield* (1902), 7 Com. Cas. 114.
(*c*) *Re Nicholls, Ex parte Wiggins* (1832), 2 Deac. & Ch. 269.

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Corn merchants.

**510.** In the London corn trade usages have been recognised for brokers selling on behalf of principals residing out of England, to become parties to the contracts of sale in their own names and make themselves liable to the purchasers as principals (*d*); and for a buyer to pay the factor upon discount, within two months, which constitute the ordinary term of payment, either for his own accommodation or that of the factor (*e*). Again, a buyer has no right by usage to reject corn merely for difference or variation in quality, provided that the difference or variation is a matter that can reasonably be met by an allowance in the price, and does not affect anything beyond the price of the goods (*f*); and by usage a distinction between "good" and "fine" barley is recognised (*g*). In the Liverpool corn market a usage has been held reasonable that in sales by sample, unless the buyer examines the bulk and rejects it the day the corn is sold, he cannot afterwards reject it or refuse to pay the whole price (*h*).

Glovers.

**511.** A usage has been established in the glove trade for the employer to let the frames at a rent to the person with whom he contracts for the manufacture of his materials into goods, and to deduct the frame rent from the money earned by the workman (*i*); a usage in the same trade that six months' notice must be given to terminate the agency of a commission agent has been set up but not judicially established (*k*).

Hop merchants.

**512.** There is a usage in the hop trade that in a written contract for the sale of hops if the word "at" so many shillings follows the specified quantity of hops, it must be construed as meaning so many shillings per cwt. (*l*); that brokers who have not disclosed the names of their principals at the time of entering into a contract for the sale or purchase of hops may be treated as principals (*m*); and that purchasers may reject hops partially stained by damp (*n*). A usage has been recognised that purchasers of hops from hop merchants may leave them in the merchant's warehouse for the purpose of resale, paying rent for the accommodation (*o*); and that the proper time for the payment of hops sold is the second Saturday following the purchase (*p*). An attempt to

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(*d*) *Johnston* v. *Usborne* (1841), 11 Ad. & El. 549.
(*e*) *Heisch* v. *Carrington* (1833), 5 C. & P. 471.
(*f*) *Re Walkers, Winser and Hamm* v. *Shaw, Son & Co.*, [1904] 2 K. B. 152.
(*g*) *Hutchison* v. *Bowker* (1839), 9 L. J. (EX.) 24.
(*h*) *Sanders* v. *James* (1848), 2 Car. & Kir. 557.
(*i*) *Chawner* v. *Cummings* (1846), 8 Q. B. 311.
(*k*) *Joynson* v. *Hunt & Son* (1905), 93 L. T. 470, C. A.
(*l*) *Spicer* v. *Cooper* (1841), 1 Q. B. 424.
(*m*) *Pike* v. *Ongley* (1887), 18 Q. B. D. 708, C. A.
(*n*) *Collard* v. *South-Eastern Rail. Co.* (1861), 30 L. J. (EX.) 393.
(*o*) *Thackthwaite* v. *Cock* (1811), 3 Taunt. 487, 491. But it was held that this usage was not so clear, distinct, and precise as to prevent the hops from becoming the property of the merchant's assignee in case of bankruptcy as being in his order and disposition; and as to this case see *Watson* v. *Peache* (1834), 1 Bing. (N. C.) 327; *Re Taylor, Ex parte Dyer* (1885), 53 L. T. 768, 769.
(*p*) *Bloxam* v. *Sanders* (1825), 4 B. & C. 941; *Durrell* v. *Evans* (1862), 1 H. & C. 174, Ex. Ch.

SECT. 1. Usages of Particular Trades.

establish a usage in this trade, that where a merchant is dealing with a hop factor he has a right to treat the factor as the only principal, and to settle for hops bought by payment to or composition with the factor only, has failed for lack of proof and of certainty (*q*); and there is no usage that in sale by sample with a warranty that the bulk equals the sample, the vendor impliedly warrants that the hops are merchantable (*r*).

Horse-dealers etc.

**513.** A usage for horse-dealers carrying on a large business in London not to sell horses on commission, but for the owner of a horse to fix the price at which he is willing to sell and for the dealer to be at liberty to get the best price he can for the horse, and to appropriate the difference between the two prices, has been recognised as valid (*s*). A usage in the same trade has been held notorious and valid for persons having horses for sale to intrust them to horse-dealers on sale or return, and to allow the latter to have the horses in their possession so that they can exhibit them to intending purchasers (*t*). An alleged usage for horse-dealers not to warrant a horse which has not been examined by a veterinary surgeon and certified by him to be sound has not been admitted in evidence (*u*). There is a usage for the owners of horses in training to select the races in which the horse is to run, and to choose the rider (*v*). A usage amongst horse trainers and apprentices that the word "necessaries" in an agreement for employment means only certain articles was found to exist by a jury, although, the court considered, on insufficient evidence (*w*). Evidence has been admitted of a usage amongst persons engaged in sport to show that an engagement to ride a race "across country" could not be regarded as fulfilled if the rider passed through an open gate to avoid a fence (*x*). There is also a usage for purchasers of farm stock to leave the animals purchased on the vendor's premises (*y*).

Iron trade.

**514.** Usages have been established in the iron trade that warrants of iron goods, which state that such goods are deliverable to the purchasers or their assigns by indorsement, are free from any vendor's lien for unpaid purchase-money, and pass from hand to hand by indorsement, and convey to the holder a good title (*z*); that a manufacturer of iron plates contracting to supply such goods

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(*q*) *Cooper* v. *Strauss & Co.* (1898), 14 T. L. R. 233.
(*r*) *Parkinson* v. *Lee* (1802), 2 East, 314.
(*s*) *Re Leigh's Estate, Rowcliffe* v. *Leigh* (1877), 6 Ch. D. 256, C. A.
(*t*) *Re Florence, Ex parte Wingfield* (1879), 10 Ch. D. 591, C. A.
(*u*) *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148. See also *Chapman* v. *Gwyther* (1866), L. R. 1 Q. B. 463. A usage in the eastern counties that a warranted horse which proves unsound may, after trial, be rejected by the purchaser has lately been established in the county court (*Ormond* v. *Vergette* (1909), 127 L. T. Jo. 85).
(*v*) *Forth* v. *Simpson* (1849), 13 Q. B. 680.
(*w*) *Abbott* v. *Bates* (1874), 43 L. J. (C. P.) 150, 153, 154.
(*x*) *Evans* v. *Pratt* (1842), 3 Man. & G. 759.
(*y*) *Priestly* v. *Pratt* (1867), L. R. 2 Exch. 101.
(*z*) *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.* (1877), 5 Ch. D. 205; see also *Gunn* v. *Bolckow, Vaughan & Co.* (1875), 10 Ch. App. 491; *Zwinger* v. *Samuda* (1817), 7 Taunt. 265.

must, in the absence of stipulation to the contrary, supply plates of his own make, and that the purchaser is entitled to reject other plates if tendered, though of the quality contracted for (*a*); that sums due in respect of wharfage of imported iron goods need not be paid by the merchant importer until the Christmas following the importation, whether the goods have been removed in the meanwhile or not (*b*); that ironworks are let with all the machinery, engines, and furniture usually necessary for carrying on such works (*c*); that the term "No. 1 pig-iron" means "Clyde and Dundyvan iron" (*d*); and in the ironmongery trade there is a usage for manufacturers of iron safes to send safes to retail ironmongers on sale or return (*e*).

Linen, cotton, and calico trades.

**515.** There are usages in the American linen trade for merchants in this country to allow their correspondents in America one year's credit, and then to charge them 5 per cent. for interest (*f*); and in the linen trade to give three months' credit, not including the months of buying and selling (*g*); in the calico printing trade, that a printer is bound to take goods which he has damaged in printing, if the owner so elects (*h*); and for packers of calico goods not to part with them when the receipts are made out in a certain form without further orders from the vendors (*i*); in the Yorkshire cotton trade, for the new tenant of a cotton mill to take over the engines and machinery of the mill at a valuation (*k*); in the Liverpool cotton trade, that if a merchant places cotton in a broker's hands for sale and the broker accepts the merchant's draft, which is then negotiated, it is the broker's duty to apply the proceeds of sale of the cotton to meet the draft when due (*l*); for Bombay cotton cargoes to be measured on the footing of being compressed by rams (*m*); in the Liverpool and American cotton trade for the word "bale" to mean a bale of compressed cotton (*n*); and in the Manchester cotton trade whereby an agreement on the sale of cotton-wefts that they are to be paid for "from six to eight weeks" does not give the purchaser eight weeks' credit (*o*).

Oil trade.

**516.** A usage has been proved in the oil trade to regard palm oil as "wet" if it contains any water at all (*p*), and in the Liverpool oil trade for palm oil to be delivered from the quay at the King's

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(*a*) *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438, C. A.
(*b*) *Crawshay* v. *Homfray* (1820), 4 B. & Ald. 50.
(*c*) *Rufford* v. *Bishop* (1829), 5 Russ. 346.
(*d*) *Mackenzie* v. *Dunlop* (1856), 3 Macq. 22, H. L.
(*e*) *Re Lock, Ex parte Poppleton* (1891), 63 L. T. 839.
(*f*) *Eddowes* v. *Hopkins* (1780), 1 Doug. (K. B.) 376.
(*g*) *Swancott* v. *Westgarth* (1808), 4 East, 75.
(*h*) *Laclouch* v. *Towle* (1800), 3 Esp. 114.
(*i*) *Bowman* v. *Horsey* (1837), 2 Mood. & R. 85.
(*k*) *Hubbard* v. *Bagshaw* (1831), 4 Sim. 326.
(*l*) *Inman* v. *Clare* (1858), 5 Jur. (N. S.) 89; compare *Catterall* v. *Hindle* (1867), L. R. 2 C. P. 368, Ex. Ch.
(*m*) *Buckle* v. *Knoop* (1867), L. R. 2 Exch. 125.
(*n*) *Taylor* v. *Briggs* (1827), 2 C. & P. 525.
(*o*) *Ashforth* v. *Redford* (1873), L. R. 9 C. P. 20.
(*p*) *Warde* v. *Stuart* (1856), 1 C. B. (N. S.) 88.

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(*i.e.*, the landing) weights, and for certain known allowances to be made (*q*).

Pottery trade.

**517.** In the pottery trade there is a usage for employees to contract to work from Martinmas to Martinmas, subject to a month's notice on either side determining the contract (*r*); and in the china trade for china manufacturers to allow certain holidays to their employees (*s*).

Printers.

**518.** There is a usage for printers not to be entitled to be paid for any part of their work until the whole has been completed and delivered (*t*); and to hire printing plant and machinery (*u*); but printers have not by usage any lien on stereotype plates for the expenses of printing (*x*); there is a usage in the newspaper and printing trade, for newspaper proprietors to allow auctioneers, as trade customers, a trade discount off their retail charges (*y*).

Provision trades.

**519.** Usages have been established, in the Irish provision trade that a general authority to a broker to sell expires on the day on which it is given (*a*); in the London fruit trade, that brokers who do not give the names of their principals are personally liable, although they contracted as brokers (*b*); in the rice trade, that if a broker does not disclose the name of his principal upon the contract note he is liable to be treated as the principal (*c*); and in the New Zealand frozen meat trade, for the documents accompanying a letter of credit to include an "all risks" policy (*d*). But usages in the bacon trade to give a certain amount of latitude in the deterioration of bacon, called "average taint" (*e*); in the tallow trade, for a contracting party to reject an undisclosed principal and look to the broker to complete the contract (*f*); in the Calcutta tea trade, that brokers buying for clients may rely on the weights marked on the boxes at the tea gardens, whether correct or not (*g*); and in the grocery trade, for grocers to hire their delivery vans (*h*), have not been upheld.

Shipbuilders.

**520.** In the Thames shipbuilding trade there is a usage for shipbuilders to give credit to shipowners for the cost of repairing the latter's vessels (*i*), and for shipbuilders to replace the paddle-

(*q*) *Bold* v. *Rayner* (1836), 1 M. & W. 343.
(*r*) *Grainger* v. *Aynsley* (1880), 6 Q. B. D. 182.
(*s*) *R.* v. *Stoke-upon-Trent* (*Inhabitants*) (1843), 5 Q. B. 303.
(*t*) *Gillett* v. *Mawman* (1808), 1 Taunt. 137.
(*u*) *Re Thackrah, Ex parte Hughes and Kimber* (1888), 5 Morr. 235.
(*x*) *Bleaden* v. *Hancock* (1829), 4 C. & P. 152.
(*y*) *Hippisley* v. *Knee Brothers*, [1905] 1 K. B. 1. See also p. 289, *post*, and, generally, title PRESS AND PRINTING.
(*a*) *Dickinson* v. *Lilwall* (1815), 4 Camp. 279.
(*b*) *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126.
(*c*) *Bacmeister* v. *Fenton, Levy & Co.* (1883), Cab. & El. 121.
(*d*) *Borthwick* v. *Bank of New Zealand* (1900), 6 Com. Cas. 1.
(*e*) *Yates* v. *Pym* (1816), 6 Taunt. 446.
(*f*) *Trueman* v. *Loder* (1840), 11 Ad. & El. 589; and see *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802.
(*g*) *Lister and Biggs* v. *Barry & Co.* (1886), 3 T. L. R. 99.
(*h*) *Re Jensen, Ex parte Callow* (1886), 4 Morr. 1.
(*i*) *Raitt* v. *Mitchell* (1815), 4 Camp. 146. See also *Re Westlake, Ex parte Willoughby* (1881), 16 Ch. D. 604.

wheels of steamers which have been removed for repairing purpose, when the vessels are lying in the river and not in a dock or at the quay wall (*k*).

Stone trade.

**521.** In the Caen stone trade there is a usage to pay the freight for cargoes of this stone half in cash and the remainder by a bill at two months (*l*); and in the Portland stone trade for quarry masters to give shipping notes on the shipment of stone (*m*).

Timber trade.

**522.** There is a valid usage in the hardwood timber trade to disregard fractions of quarter of an inch in measuring the cross dimensions of such timber (*n*); for vessels carrying timber from Canada to this country to stow it on deck (*o*); and for ships engaged in the Baltic timber trade to carry deck cargoes (*p*). It has been established that the usual mode of discharging Danzig oak logs at the Millwall Dock in London is into railway trucks, and, failing that, into lighters (*q*).

An alleged usage in the Baltic timber trade which was said to compel a charterer or receiver of a cargo of timber in the London Docks from the Baltic to provide a berth to receive a vessel when she arrives, was held insufficiently notorious (*r*).

Tobacco trade.

**523.** There is a usage in the tobacco trade that sales of tobacco are always sales by sample (*s*), and that manufacturers purchasing tobacco in bond from tobacco dealers pay the price but allow the tobacco to remain in bond, to be forwarded as trade purposes may require, the tobacco being cleared by the dealer, and the manufacturer remitting to the latter the duty and dock charges (*t*).

Wine and spirit trade.

**524.** In the Bristol wine trade, wine merchants who are also bonded cellar-keepers have by usage a general lien upon the goods of a customer lying in their cellars for the amount of their general account against him, whether such goods have been paid for or not (*u*); and in the Liverpool wine and spirit trade a usage has been established for goods sold in bond to remain in the possession or under the control of the vendors in the bonded warehouse in which they were at the time of the sale, until they are required by the purchaser for use (*v*), and this usage extends to goods in the warehouse of a third party (*w*). In the London colonial rum trade

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(*k*) *Pearson* v. *Commercial Union Assurance Co.* (1876), 1 App. Cas. 498.
(*l*) *Luard* v. *Butcher* (1846), 2 Car. & Kir. 29.
(*m*) *Dickenson* v. *Lano* (1860), 2 F. & F. 188.
(*n*) *Young* v. *Canning Jarrah Timber Co., Ltd.* (1899), 4 Com. Cas. 96.
(*o*) *Gould* v. *Oliver* (1837), 4 Bing. (N. C.) 134.
(*p*) *Burton* v. *English* (1883), 12 Q. B. D. 218, C. A.
(*q*) *Rodenacker* v. *May* (1901), 6 Com. Cas. 37.
(*r*) *Nelson* v. *Dahl* (1879), 12 Ch. D. 568, C. A.
(*s*) *Syers* v. *Jonas* (1848), 2 Exch. 111.
(*t*) *Johnson* v. *Crédit Lyonnais* (1877), 2 C. P. D. 224; 3 C. P. D. 32, C. A.
(*u*) *Re Hancock, Ex parte Ludlow*, [1879] W. N. 65.
(*v*) *Re Couston, Ex parte Watkins* (1873), 8 Ch. App. 520; *Knowles* v. *Horsfall* (1821), 5 B. & Ald. 134.
(*w*) *Re Couston, Ex parte Vaux* (1874), 9 Ch. App. 602; *Knowles* v. *Horsfall*, *supra*.

SECT. 1. **Usages of Particular Trades.**

a sale of rum for prompt payment means by usage payment in cash on delivery (*x*).

Wool trade.

**525.** There is a usage in the Liverpool wool trade allowing a broker employed to buy wool either to contract in the name of his principal, or, at the request of the seller, to make himself responsible for the price (*y*); and in the Australian wool trade for wool coming down country to Sydney for shipment to be taken to the stevedore's storehouses to be pressed by hydraulic power so as to minimise its bulk (*z*).

Miscellaneous trades.

**526.** The following usages, which are too miscellaneous to admit of separate classification, have also been established:—In the bookselling trade, for booksellers to have books for sale on commission (*a*); in the coach-building trade, for carriages built to order to be put in showrooms before delivery (*b*); in the clock-making trade, for clocks to be left with clockmakers for repairs (*c*); in the cycle trade for persons purchasing cycles for the purpose of resale at a profit to be styled "agents for sale" in contracts (*d*); in the diamond trade, that a broker has no authority to pledge diamonds intrusted to him for sale so as to obtain advances for his principal (*e*); in the drug trade, that on the sale of pimento which has been sea-damaged the fact of the damage must be stated (*f*); in the London dry goods trade, that a broker for sale is liable for the default of his undisclosed principal (*g*); in the East India trade, for merchants not to part with the bill of lading of goods until the purchaser has taken up his acceptances on account thereof (*h*); in the fur trade, that a person ordering on approval is responsible for loss or damage while in his hands before he signifies his approval (*i*); in the furniture trade, for dealers to let out furniture on a three years' hire and purchase system (*k*); in the hemp trade, that delivery orders should be in a certain form when hemp is landed and warehoused in bulk (*l*); in the packing trade, for packers to have a lien on the goods of their customers (*m*); in the piano trade, for dealers to hire out pianos on the three years' hire system (*n*); in the warehousing trade, for warehouse keepers in London to make allowance for warehouse rent upon all sales of rum whether West

(*x*) *Gregson* v. *Ruck* (1843), 4 Q. B. 737.
(*y*) *Cropper* v. *Cook* (1868), L. R. 3 C. P. 194.
(*z*) *Australian Agricultural Co.* v. *Saunders* (1875), L. R. 10 C. P. 668, Ex. Ch.
(*a*) *Whitfield* v. *Brand* (1847), 16 M. & W. 282; and see note (*q*) on p. 274, *ante*.
(*b*) *Bartram* v. *Payne* (1827), 3 C. & P. 175.
(*c*) *Hamilton* v. *Bell* (1854), 10 Exch. 545.
(*d*) *John Griffiths Cycle Corporation, Ltd.* v. *Humber & Co., Ltd.*, [1899] 2 Q. B. 414, C. A.
(*e*) *Oppenheimer* v. *Attenborough & Son*, [1908] 1 K. B. 221, C. A.
(*f*) *Jones* v. *Bowden* (1813), 4 Taunt. 847.
(*g*) *Imperial Bank* v. *London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195.
(*h*) *Coventry* v. *Gladstone* (1867), L. R. 4 Eq. 493.
(*i*) *Bevington* v. *Dale* (1902), 7 Com. Cas. 112.
(*k*) *Re Fowler, Ex parte Brooks* (1883), 23 Ch. D. 261, C. A.
(*l*) *Moore* v. *Campbell* (1854), 10 Exch. 323.
(*m*) *Ex parte Deeze* (1748), 1 Atk. 228; *Green* v. *Farmer* (1768), 4 Burr. 2214; *Re Witt, Ex parte Shubrook* (1876), 2 Ch. D. 489, C. A.
(*n*) *Re Blanshard, Ex parte Hattersley* (1878), 8 Ch. D. 601.

Indian or Cuban (*o*), and to have a general lien upon all goods deposited for all charges in respect of the goods (*p*); in the South Sea whaling trade, that vessels should render assistance without claiming salvage (*q*), and that amongst whalers generally a whale is regarded as a "fast" fish when attached by any line to the persons seeking its capture (*r*).

Attempts have failed to set up a usage in the brush trade whereby it has been alleged a special meaning attaches to the word "tapering" as applied to brushes (*a*); in the cloth trade, to send goods for inspection (*b*); in the trade of common carriers, for them to have a general lien upon goods intrusted to them for carriage for a general balance due to them from the persons employing them (*c*); and for wharfingers at Hull to have a general lien for wharfage and labour (*d*).

## SECT. 2.—*Usages of Professions and Occupations.*

### SUB-SECT. 1.—*Usages of the Legal Profession.*

Legal profession.

**527.** Usages have been recognised as to the liability of certain parties for the payment of costs and expenses incurred by other parties in transactions concerning legal affairs, and as to the rights and duties of such parties in transactions of this kind. There is a usage in the legal profession that, in the absence of any stipulation to the contrary, the lessor or his solicitor prepares the lease and the lessee bears the costs and expenses of the preparation and execution of the lease (*e*). There is a similar usage which requires the lessor to pay for the costs and expenses of the preparation and execution of the counterpart lease, unless the agreement between the parties otherwise provides (*f*).

Marriage settlement.

**528.** There is also a usage in the legal profession that an intending husband shall pay the costs of his intended wife's solicitors in respect of the preparation and execution of the marriage settlement (*g*); and this usage requires the husband to allow the wife's solicitors to prepare the settlement (*h*). The term "marriage settlement" in this respect includes any document necessary for the completion of a marriage settlement—any

(*o*) *Fawkes* v. *Lamb* (1862), 31 L. J. (Q. B.) 98.
(*p*) *Re Hancock, Ex parte Ludlow*, [1879] W. N. 65; *Re Catford, Ex parte Carr and Ford* (1894), 71 L. T. 584; see also *Holderness* v. *Collinson* (1827), 7 B. & C. 212; *Dresser* v. *Bosanquet* (1863), 32 L. J. (Q. B.) 374, Ex. Ch.
(*q*) *The Harriot* (1842), 1 Wm. Rob. 439.
(*r*) *Hogarth* v. *Jackson* (1827), 2 C. & P. 595; *Fennings* v. *Grenville* (*Lord*) (1808), 1 Taunt. 241; *Littledale* v. *Scaith* (1788), 1 Taunt. 243, n.; *Aberdeen Arctic Co.* v. *Sutter* (1862), 6 L. T. 229, H. L.
(*a*) *R.* v. *Metcalf* (1817), 2 Stark. 249.
(*b*) *Wood* v. *Wood* (1823), 1 C. & P. 59.
(*c*) *Rushforth* v. *Hadfield* (1805), 6 East, 519; S. C. (1806), 7 East, 224.
(*d*) *Holderness* v. *Collinson*, *supra*.
(*e*) *Smith* v. *Clegg* (1858), 27 L. J. (EX.) 300.
(*f*) *Re Negus*, [1895] 1 Ch. 73, *per* CHITTY, J., at p. 81; *Jenning* v. *Major* (1837), 8 C. & P. 61; and see titles LANDLORD AND TENANT; SOLICITORS.
(*g*) *Helps* v. *Clayton* (1864), 17 C. B. (N. S.) 553; *Re Lawrance, Bowker* v. *Austin*, [1894] 1 Ch. 556, *per* KEKEWICH, J., at pp. 558, 559.
(*h*) *Helps* v. *Clayton*, *supra*.

SECT. 2. Usages of Professions and Occupations.

muniments of title or documents of that kind, without which the marriage settlement is not complete; thus, for instance, where real estate is conveyed to trustees in trust for sale and to hold the proceeds upon the trusts of an indenture of even date, the two documents comprise one marriage settlement (*i*).

Mortgages.

**529.** Although it is almost the invariable practice for the mortgagor to pay the costs of the mortgagee's solicitor, there is not any usage which binds him to do so as between such solicitor and himself (*k*). The prevailing practice in all mortgage transactions for the mortgagor to pay to the mortgagee the latter's costs does not rest upon usage, but upon an implied indemnity at common law (*l*). Upon the transfer of a mortgage, if the mortgagor has not been called upon to pay off the mortgage debt, and if the transfer is made without his concurrence, there is no liability upon him, in respect of any usage, to pay the mortgagee's costs (*m*).

Sale of copyholds.

**530.** Usage in the legal profession also requires the purchaser of copyholds to pay the fines on admittance and the stewards' fees, both on the surrender and admittance (*n*).

London agents.

**531.** A usage has also been recognised that where an attorney in the country employs another attorney to transact business for the benefit of a client of the former, the latter attorney shall look to the other, and not to the client, for payment of his costs and expenses (*o*).

SUB-SECT. 2.—*Usages of Brokers and Bankers.*

Personal liability of brokers.

**532.** There are a large number of usages which have been upheld affecting the position of brokers dealing in different markets and trades (*p*). The following usages affecting the personal liability of brokers occur in reported cases:—A usage that brokers in the hop trade who do not disclose the names of their principals at the time of making a contract are personally liable as principals although they contracted as brokers (*q*); that brokers buying for undisclosed principals in the London dry goods market are held responsible to the seller for the price of the goods in case the purchaser fails to pay (*r*); that a broker purchasing oil in London and not disclosing the name of his principal may be rendered liable

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(*i*) *Re Lawrance, Bowker* v. *Austin*, [1894] 1 Ch. 556, *per* KEKEWICH, J., at p. 558. See title SETTLEMENTS.

(*k*) *Rigley* v. *Daykin* (1828), 2 Y. & J. 83; *Wilkinson* v. *Grant* (1856), 18 C. B. 319; *Pratt* v. *Vizard* (1833), 5 B. & Ad. 808; *Re Roberts* (1889), 43 Ch. D. 52, *per* KAY, J., at p. 54.

(*l*) *Wales* v. *Carr*, [1902] 1 Ch. 860, *per* FARWELL, J., at p. 861.

(*m*) *Re Radcliffe* (1856), 22 Beav. 201; see title MORTGAGE.

(*n*) *Drury* v. *Man* (1746), 1 Atk. 95; *Re Eastern Counties Rail. Co., Ex parte Sawston* (*Vicar*) (1858), 4 Jur. (N. S.) 463.

(*o*) *Scrace* v. *Whittington* (1823), 1 L. J. (O. S.) (K. B.) 221. See also title SOLICITORS.

(*p*) For usages affecting brokers on the London and other Stock Exchanges, see title STOCK EXCHANGE.

(*q*) *Pike* v. *Ongley* (1887), 18 Q. B. D. 708, C. A.

(*r*) *Imperial Bank* v. *London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195

as purchaser (*s*); that a broker in the rice trade not disclosing the name of his principal upon the contract note is liable to be treated as principal (*t*); that a broker purchasing wool in the Liverpool wool market may either contract in his principal's name or may make himself personally liable at the request of the seller, without communicating the fact of his personal liability to his principal (*a*); that a broker in the London fruit trade not disclosing the name of his principal is personally liable, although he contracts as a broker for a principal (*b*); that a broker in the London tallow trade receiving an order from a principal for the purchase of tallow makes a contract in his own name without disclosing his principal and becomes personally bound by the contract (*c*).

Other usages affecting brokers.

**533.** Other usages affecting the position of brokers (*d*) are usages in the Irish provision trade that a general authority given to a broker expires on the day on which it is given (*e*); in the cotton trade for payment to a broker in advance (*f*); in the Liverpool wool market that where a broker purchases wool and the contract contains a stipulation that notice of an event should be given by the vendor to the purchaser, the vendor gives the notice to the broker, who communicates it to the purchaser (*g*); that a buyer in the London corn market may pay the factor upon discount within the two months which constitute the ordinary time of payment either for his own accommodation or that of the factor (*h*); that in the London colonial trade a sale for prompt payment means payment in cash on delivery (*i*); and that in the drug trade a principal for whom a broker has made a contract may return the contract within twenty-four hours if he does not approve of it (*k*).

Ship brokers.

**534.** The following usages have been recognised in the case of ship brokers:—There is a usage that whenever charters are entered into by brokers in accordance with telegraphic instructions, they should sign the charter in such a form as to avoid absolute warranty (*l*); a usage as to a ship broker's right to commission upon chartering a ship for the Baltic trade (*m*); that when a broker has introduced a ship's captain to a merchant and negotiation follows as to the intended voyage the broker is entitled to commission although the charterparty is prepared by someone else (*n*); that a

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(*s*) *Humfrey* v. *Dale* (1857), 7 E. & B. 266; *Southwell* v. *Bowditch* (1876), 1 C. P. D. 374, C. A.; *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482; *Pike* v. *Ongley* (1887), 18 Q. B. D. 708.

(*t*) *Bacmeister* v *Fenton, Levy & Co.* (1883), Cab. & El. 121.

(*a*) *Cropper* v. *Cook* (1868), L. R. 3 C. P. 194.

(*b*) *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126.

(*c*) *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802.

(*d*) As to usages affecting shipping brokers, see para. 534, above; and as to maritime insurance brokers, see p. 296, *post*, and title INSURANCE.

(*e*) *Dickinson* v. *Lilwall* (1815), 4 Camp. 279.

(*f*) *Catterall* v. *Hindle* (1867), L. R. 2 C. P. 368, Ex. Ch.

(*g*) *Greaves* v. *Legg* (1856), 11 Exch. 642.

(*h*) *Heisch* v. *Carrington* (1833), 5 C. & P. 471.

(*i*) *Gregson* v. *Ruck* (1843), 4 Q. B. 737.

(*k*) *Humphries* v. *Carvalho* (1812), 16 East, 45.

(*l*) *Lilly, Wilson & Co.* v. *Smales, Eeles & Co.*, [1892] 1 Q. B. 456.

(*m*) *Cohen* v. *Paget* (1814), 4 Camp. 96.

(*n*) *Burnett* v. *Bouch* (1840), 9 C. & P. 620.

SECT. 2. Usages of Professions and Occupations.

broker in Liverpool is entitled to commission for procuring a charter although he employs another to procure it (*o*); that a broker effecting an introduction between parties which leads to a charter is entitled to commission upon the first and subsequent charters between the same parties (*p*); for the broker and the underwriter to settle the amount payable in respect of loss under a marine insurance, and for the broker to receive that amount when settled on behalf of the assured (*q*); for shipping agents to sign bills of lading in the Mediterranean ports (*r*); that a charterparty in a certain printed form applies both to the outward and the homeward voyage (*s*); that a broker in the city of London is entitled to receive a certain commission from the owner on the amount of the freight if a complete contract is effected, but that if no contract is effected he is not entitled to receive anything for his trouble in negotiating with the parties (*a*); and that a broker who does not disclose the name of the charterer within a reasonable time after the charterparty has been signed is personally liable (*b*).

Minimum limit of price.

**535.** There cannot be a usage in respect of goods consigned to agents for sale with a minimum limit of price that such agents may themselves purchase the goods at such minimum (*c*).

Usages as to negotiability.

**536.** There is a usage of bankers and persons engaged in financial transactions to treat as negotiable instruments the bonds of the De Beers Consolidated Mines, Limited, the Denver and Rio Grande Railroad Company, the Mexican National Railroad Company, and the Union Pacific Railroad Company (*d*), the debentures of the Beira Junction Railway Company, Limited (*e*), the scrip of the Imperial Government of Russia's (1873) Loan, and of the Austro-Hungarian Government Loan (*f*), the bonds of the King of Prussia (*g*), the share warrants to bearer issued by the Alexandria Water Company, Limited (an English company registered under the Companies Act, 1867) (*h*), the bonds of the South and North Alabama Railroad Company (a company created by the State of Alabama, U.S.A.) (*i*), and the scrip certificates of the Anglo-Egyptian Banking Company, Limited (*k*).

The question whether the bonds of the Buenos Ayres Land

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(*o*) *Smith* v. *Boutcher* (1844), 1 Car. & Kir. 573.
(*p*) *Allan* v. *Sundius* (1862), 1 H. & C. 123.
(*q*) *Hine Brothers* v. *Steamship Insurance Syndicate, Ltd.* (1895), 72 L. T. 79, C. A.
(*r*) *Jessel* v. *Bath* (1867), L. R. 2 Exch. 267.
(*s*) *Hibbert* v. *Owen* (1859), 2 F. & F. 502.
(*a*) *Read* v. *Rann* (1830), 10 B. & C. 438.
(*b*) *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482.
(*c*) *De Bussche* v. *Alt* (1878), 8 Ch. D. 286, C. A., at p. 317.
(*d*) *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144.
(*e*) *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658.
(*f*) *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476.
(*g*) *Gorgier* v. *Mieville* (1824), 3 B. & C. 45.
(*h*) *Webb, Hall & Co.* v. *Alexandria Water Co., Ltd.* (1905), 93 L. T. 339.
(*i*) *Venables* v. *Baring Brothers & Co.*, [1892] 3 Ch. 527.
(*k*) *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194. See, generally, title BILLS OF EXCHANGE, Vol. II., p. 564.

Mortgage Bank (J series), known as "Cedulas," are by usage negotiable has been raised but not expressly decided (*l*).

Bankers' usages.

**537.** A usage between money-lenders and banks in London that money-lenders are at liberty to deposit securities pledged to them by borrowers for their own debt without reference to the question of what is done as between them and their customers has been held proved, but not of such notoriety as to bind persons ignorant of it (*m*). There is a usage for bankers to have a general lien upon all securities deposited with them as bankers by their customers (*n*); between London bankers, as to their dealings with the customers of their country correspondents, to the effect that there is no accountability between the London bankers and the customers, and that all moneys received to the use of the latter are paid to or are placed to the credit of the country bankers, for whom alone the London bankers are agents (*o*). A usage has been established for bankers in the city of London to present cheques at the clearing-house the same day as they are paid in (*p*); for colonial brokers to accept bills of exchange as part of their business (*q*); for merchants not to treat a promissory note payable to a person or his order as a negotiable instrument (*r*); that a bill of exchange cannot be indorsed for part only of the money mentioned on its face (*s*); that a bill of exchange is assignable by indorsement (*t*), and that liability to pay is incurred by acceptance (*u*); for a fixed percentage by way of liquidated damages to be allowed in lieu of exchange, re-exchange, and other charges when bills are returned from the colonies (*a*); and that one partner drawing a bill of exchange binds the other (*b*).

An alleged usage amongst merchants that a person is bound to pay upon a written promise signed by him without consideration has been held bad (*c*).

SUB-SECT. 3.—*Usages of Other Professions, Businesses and Occupations.*

Theatrical profession.

**538.** There is a usage in the theatrical profession that an actor or actress engaged to perform for one or more years is never paid during the part of the year when the theatre is closed (*d*); that a theatre proprietor who has agreed to provide the theatre for the

(*l*) *Simmons* v. *London Joint Stock Bank*, [1891] 1 Ch. 270, C. A.
(*m*) *Easton* v. *London Joint Stock Bank* (1886), 34 Ch. D. 95, C. A.
(*n*) *London Chartered Bank of Australia* v. *White* (1879), 4 App. Cas. 413, P. C.; *Davis* v. *Bowsher* (1794), 5 Term Rep. 488; *Brandao* v. *Barnett* (1846), 12 Cl. & Fin. 787, H. L.
(*o*) *Adams* v. *Peters* (1849), 2 Car. & Kir. 723. But WILDE, C.J., said this evidence was not given "to set up a custom."
(*p*) *Boddington* v. *Schlencker* (1833), 4 B. & Ad. 752.
(*q*) *Schweitzer* v. *Long* (1863), 3 F. & F. 687.
(*r*) *Clerke* v. *Martin* (1702), 2 Ld. Raym. 757.
(*s*) *Hawkins* v. *Cardy* (1698), 1 Ld. Raym. 360.
(*t*) *Carter* v. *Downich* (1688), 3 Mod. Rep. 227.
(*u*) *Ereskine* v. *Murray* (1728), 2 Ld. Raym. 1542.
(*a*) *Willans* v. *Ayers* (1877), 3 App. Cas. 133, P. C.
(*b*) *Pinkney* v. *Hall* (1697), 1 Ld. Raym. 175.
(*c*) *Potter* v. *Pearson* (1702), 2 Ld. Raym. 759. See also title BANKERS AND BANKING, Vol. I., p. 567.
(*d*) *Grant* v. *Maddox* (1846), 15 M. & W. 737. See also title THEATRES ETC.

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performance of an agreed play for a specified period cannot allow the performance of any other play during that period in that theatre (*e*); and that an actor or actress engaged to understudy another is only entitled to do so if called upon by the employer (*f*); but an attempt to establish a usage among theatrical persons that an actor engaged to act in a play about to be produced can insist upon the manager allowing him to "open" in the part, and that if after his appearance he should not give satisfaction he is entitled to a week's notice on the first pay day and a week's salary on dismissal, has failed for want of proof (*g*).

Land agents.

**539.** A usage has been established in the profession of estate and land agents that, where several agents are employed to procure a purchase, the one who finds a purchaser is entitled to a commission whether he does anything more towards the completion of the purchase or not (*h*).

Architects.

**540.** There is a usage that an architect (*i*) is entitled to be paid by the employer for taking out the quantities, although the building is abandoned (*k*). An alleged usage for architects to charge fees upon a scale depending upon the amount of compensation awarded in arbitration proceedings in which they take part has been held bad (*l*).

Auctioneers.

**541.** There is a usage in the business of an auctioneer to charge 5 per cent. on the first £500 of the purchase-money and $2\frac{1}{2}$ per cent. on the remainder (*m*); and that after an auctioneer is employed and the property has been advertised by him he is entitled to full commission on the sale being effected, although not through his direct agency (*n*); but an alleged usage of auctioneers to sell by private treaty when an attempted sale by public auction has proved abortive, although not expressly authorised by the person employing him, has not been established (*o*).

Servants.

**542.** There are also many usages which affect domestic and contractual relationships which are not the outcome of trade in the generally accepted meaning of that word. Thus there is a usage for domestic servants to be entitled to a calendar month's wages or a calendar month's warning (*p*). This usage has been held to extend to a head gardener living in a cottage rent free near his master's

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(*e*) *Cotton* v. *Sounes* (1902), 18 T. L. R. 456.
(*f*) *Newman* v. *Gatti* (1907), 24 T. L. R. 18, C. A.
(*g*) *White* v. *Henderson* (1885), 2 T. L. R. 119.
(*h*) *Murray* v. *Currie* (1836), 7 C. & P. 584.
(*i*) For other usages affecting architects, see usages in the building trade, p. 276, *ante*, and title BUILDING CONTRACTS ETC., Vol. III., p. 288.
(*k*) *Lansdowne* v. *Somerville* (1862), 3 F. & F. 236.
(*l*) *Brocklebank* v. *Lancashire and Yorkshire Rail. Co.* (1887), 3 T. L. R. 575, C. A.
(*m*) *Re Page* (1863), 11 W. R. 584.
(*n*) *Rainy* v. *Vernon* (1840), 9 C. & P. 559.
(*o*) *Marsh* v. *Jelf* (1862), 3 F. & F. 234.
(*p*) *Beeston* v. *Collyer* (1827), 4 Bing. 309, 310; *Turner* v. *Mason* (1845), 14 M. & W. 112; *Gordon* v. *Potter* (1859), 1 F. & F. 644. See also title DAMAGES, p. 339, *post*, and, generally, title MASTER AND SERVANT.

house, and having the management of extensive grounds with assistant gardeners under him (*q*). There is also a usage for huntsmen to be engaged for the whole hunting season, and not to be dismissed before the end of the season (*r*). There is no usage analogous to that in respect of domestic servants with regard to the termination of a governess's engagement (*a*). There may be a usage that if a domestic servant gives notice during the first fortnight he or she may leave at the end of the first month, and in that event is entitled to have the character which he or she brought when entering the service handed over to a subsequent employer. Such a usage is not unreasonable, but it is not notorious, and must be sufficiently proved by evidence (*b*).

Termination of service.

**543.** A usage has been recognised that, where a commercial traveller is hired yearly, he or his employer may put an end to the service on giving three months' notice (*c*); that a calico printer's salesman may be dismissed on a month's notice (*d*); that an editor is entitled to twelve months' notice before dismissal (*e*); that a sub-editor is entitled to six months' notice (*f*); that the employment of a "transferrer" or potting printer's assistant in the pottery trade may be terminated without any notice (*g*); that the engagement of a woollen merchant's representative may be put an end to by a month's notice on the part of the merchant or his representative where there is a yearly salary (*i*); that newspaper proprietors should give four weeks' notice to printers before taking the work from them, or pay them four weeks' wages instead (*k*); that three months' notice is given to terminate the engagement of a clerk in a finance office although he has been engaged at a fixed yearly salary (*l*); that journeymen carpenters in London engaged to do work at a distance are entitled to have their travelling expenses paid by their employers, unless dismissed when in the country for bad behaviour (*m*). An attempt to establish a usage in newspaper offices that an advertisement agent is entitled to commission on all advertisements appearing in the paper after

(*q*) *Nowlan* v. *Ablett* (1835), 4 L. J. (EX.) 155. The jury found that this usage existed, but the court was of opinion that the evidence did not warrant this finding.

(*r*) *Nicoll* v. *Greaves* (1864), 17 C. B. (N. S.) 27.

(*a*) *Todd* v. *Kellage* (1852), 22 L. J. (EX.) 1.

(*b*) *Moult* v. *Halliday*, [1898] 1 Q. B. 125. In a case at Brentford County Court (1908, January 10) the learned judge is reported to have said that he was prepared to take judicial cognisance of a usage that either party may determine the hiring at the end of the first month by notice given at or before the expiration of the first fortnight (see 52 Sol. Jo. 191).

(*c*) *Metzner* v. *Bolton* (1854), 9 Exch. 518; *Grundon* v. *Master & Co.* (1884), 1 T. L. R. 205.

(*d*) *Appleby* v. *Johnson* (1874), L. R. 9 C. P. 158.

(*e*) *Holcroft* v. *Barber* (1843), 1 Car. & Kir. 4; *Brennan* v. *Gilbart-Smith* (1892) 8 T. L. R. 284.

(*f*) *Chamberlain* v. *Bennett* (1892), 8 T. L. R. 234.

(*g*) *Grainger* v. *Aynsley* (1880), 6 Q. B. D. 182.

(*i*) *Parker* v. *Ibbetson* (1858), 27 L. J. (C. P.) 236.

(*k*) *Cunningham* v. *Fonblanque* (1833), 6 C. & P. 44.

(*l*) *Foxall* v. *International Land Credit Co.* (1867), 16 L. T. 637.

(*m*) *Read* v. *Dunsmore* (1840), 9 C. & P. 588.

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his dismissal or cesser of employment, if he was instrumental in obtaining them, has failed for want of proof (*n*).

## SECT. 3.—"*Customs of the Port.*"

### SUB-SECT. 1.—*Usages of English Ports.*

Usages of the port of London.

**544.** There are usages in many seaports which are generally known as "customs of the port" which have been frequently established in litigation. In the port of London usages have been recognised for merchants to employ wharfingers to discharge cargoes (*o*); for consignees to be entitled to insist upon having delivery "overside" (*p*); for merchants engaged in the Russian trade to employ public lighters to unload ships in the Thames coming from Russia (*q*); for steamships with general cargoes using the docks to land their cargoes on the quay (*r*); for coal merchants hiring barges on the Thames to paint their own names upon the barges (*s*); for wharfingers to deliver outgoing goods to the mate and crew of the ship which is to carry them (*t*); that if the merchant does not demand delivery of grain composing a grain cargo or part of such cargo coming to London within twenty-four hours after the ship's arrival, the ship is entitled to discharge the goods upon the quay (*a*); that the owner of a ship bringing such a cargo into London, although he must place the timber into barges or on the quay, need not either stow it on the barge or stack it on the quay (*b*); that goods on board vessels unloading in the Victoria Docks are taken from the deck of the vessel by the dock company's servants and placed on the dock quay, or if perishable, under sheds, and if the consignee or his agent does not appear to claim them within twenty-four hours they are warehoused by the company (*c*); for cargoes of fruit coming to the docks by steamer to be discharged immediately the vessel is ready to discharge, and if the consignees are not there to receive them, to be discharged upon the dock quays (*d*); that in discharging long lengths of timber from a ship in the Thames or in dock the shipowner is bound to put the timber into lighters brought alongside (*e*); to discharge log cargoes from vessels in the Millwall Dock into railway trucks, and if no trucks are there, to stack the timber on the quay (*f*); to disregard fractions

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(*n*) *Bettany* v. *Eastern Morning and Hull News Co., Ltd.* (1900), 16 T. L. R. 401.
(*o*) *Rucker* v. *London Assurance Co.* (1784), 2 Bos. & P. 432, n.
(*p*) *Borrowman, Phillips & Co.* v. *Wilson & Co.* (1891), 7 T. L. R. 416.
(*q*) *Hurry* v. *Royal Exchange Assurance Co.* (1801), 2 Bos. & P. 430.
(*r*) *Marzetti* v. *Smith & Co.* (1882), Cab. & El. 6.
(*s*) *Watson* v. *Peache* (1834), 1 Bing. (N. C.) 327.
(*t*) *Cobban* v. *Downe* (1803), 5 Esp. 41.
(*a*) *Aste, Son and Kerchevel* v. *Stumore, Weston & Co.* (1884), Cab. & El. 319.
(*b*) *Brenda Steamship Co.* v. *Green*, [1900] 1 Q. B. 518, C. A.; *Hulthen* v. *Stewart* (1903), 8 Com. Cas. 297.
(*c*) *Petrocochino* v. *Bott* (1874), L. R. 9 C. P. 355.
(*d*) *Alixiada* v. *Robinson* (1861), 2 F. & F. 679.
(*e*) *Aktieselkab Helios* v. *Ekman & Co.*, [1897] 2 Q. B 83, C. A.; *Hulthen* v. *Stewart* (1903), 8 Com. Cas. 297, H. L.
(*f*) *Rodenacker* v. *May* (1901), 6 Com. Cas. 37.

of inches and feet in measuring the dimensions of timber cargoes (*g*); that the word "days" in a bill of lading with reference to the discharge of cargo means working days, not running days (*h*); for the delivery of goods by hoymen (*i*); for goods to be stored in safe custody until they can be delivered to the consignees (*k*); for shipbuilders to replace the paddle-wheels of steamers which have been removed for repair while the steamers are lying in the river Thames, and not alongside a quay or in a dock (*l*); for the shipmaster to guard goods loaded into a lighter sent for them by the consignee until the loading is complete (*m*).

Usages not established in London.

An attempt to establish a usage of the port of London in the Baltic timber trade for the importers of timber to provide berths for the discharge of the cargo (*n*), and a usage in the same port with reference to the export of coals for the use of the French Government on the coast of Africa (*o*). An alleged custom of the port of London for lightermen to be paid a shilling an hour for working overtime in discharging sugar cargoes over and above their overtime payment has been held unreasonable, and an attempt to set it up failed for want of proof (*p*). No usage has been established that consignees of goods shipped in bulk pay freight according to the weight in the bill of lading, unless they are weighed on board, or at the ship's side by the dock company, or at a wharf or quay, the consignees paying the expense (*q*); or that consignees discharge their duty under bills of lading drawn in a particular form, when they have sent to the ship lighters of sufficient capacity to take goods comprised in a number of such bills of lading and that they are not bound to send a separate lighter in respect of each bill of lading (*r*); or that consignees must send separate lighters for each parcel of goods consigned under one of such bills of lading (*s*); or that, in regard to the discharge overside of grain cargo in bags, it is the duty of the consignee to give an order to the dock company to weigh the cargo on board and to pay their charges for so doing (*t*).

Liverpool.

**545.** In the port of Liverpool usages have been recognised to load ships with one-third weight goods and two-thirds measurement goods (*u*); for ship brokers to receive a commission for procuring a charter (*a*); for the ship to bear the expense of trucking from the shed and piling in the transit shed when cargoes of dried fruit are

(*g*) *Young* v. *Canning Jarrah Timber Co., Ltd.* (1899), 4 Com. Cas. 96.
(*h*) *Cochran* v. *Retberg* (1800), 3 Esp. 121.
(*i*) *Wardell* v. *Mourillyan* (1798), 2 Esp. 693.
(*k*) *Bourne* v. *Gatliffe* (1841), 3 Man. & G. 643, Ex. Ch.
(*l*) *Pearson* v. *Commercial Union Assurance Co.* (1876), 1 App. Cas. 498.
(*m*) *Catley* v. *Wintringham* (1792), Peake, 202.
(*n*) *Nelson* v. *Dahl* (1879), 12 Ch. D. 568, C. A.
(*o*) *Robertson* v. *Jackson* (1845), 2 C. B. 412.
(*p*) *Grey* v. *Butler's Wharf, Ltd.* (1898), 3 Com. Cas. 67.
(*q*) *Coulthurst* v. *Sweet* (1866), L. R. 1 C. P. 649.
(*r*) *Pollitzer* v. *Steamship Cascapedia* (1886), 2 T. L. R. 413.
(*s*) *Ibid.*
(*t*) *Marwood* v. *Taylor* (1901), 6 Com. Cas. 178, C. A.
(*u*) *Pust* v. *Dowie* (1864), 5 B. & S. 20.
(*a*) *Smith* v. *Boutcher* (1844), 1 Car. & Kir. 573.

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being discharged (*b*); that, in the case of timber ships, the lay-days commence only from the mooring of the vessel at the quay where only, by the regulations of the dock, she is allowed to discharge (*c*); for palm oil to be delivered from the quay at the King's (*i.e.*, the landing) weights, and for certain known allowances to be made (*d*); as to the meaning of the words "usual dispatch" as applied to the loading of coal (*e*); for a dock company's servants to do the whole of the discharging of ships at the quay (*f*); and for discount to be allowed on freight payable under a bill of lading coming from the United States of America (*g*).

Bristol.

**546.** In the port of Bristol there is a valid usage for cargoes of grain to be discharged by the joint action of the consignees and the shipowner, the former providing sacks and loading them in the hold, and the latter delivering the sacks over the side of the ship (*h*). An attempt to re-establish a usage of the same port that a consignee could not be required to take delivery at a faster rate than 500 tons a day failed owing to altered circumstances rendering the alleged usage unreasonable (*i*).

Hull.

**547.** There is a usage in the port of Hull for consignees of timber cargoes to supply a berth for a chartered ship on her arrival in dock, and to provide space for and the means for unloading the vessel (*k*); but a usage for wharfingers to have a general lien for wharfage labour and warehouse rent (*l*), and a usage that "days" in a charterparty mean "working days" (*m*), have not been established at this port.

Newcastle-on-Tyne.

**548.** In the port of Newcastle-on-Tyne there is a usage to enter a vessel as soon as she is chartered on the "fitter's list" for her turn to load coke (*n*). An attempt has failed to establish as a custom of the port a somewhat similar usage that all ships intended to take in cargoes of coal or coke must be entered in the "turn book," not only before they are ready to load, but before their arrival at the dock or even at the port, although this was found to be the usage of a particular colliery (*o*).

Belfast.

**549.** In the port of Belfast there is a valid usage that delivery of log timber coming into that port takes place after the chaining and rafting of the timber by the ship and the measuring by the official measurer (*p*).

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(*b*) *Cardiff Steamship Co., Ltd.* v. *Jameson* (1903), 88 L. T. 87.
(*c*) *Norden Steam Co.* v. *Dempsey* (1876), 1 C. P. D. 654.
(*d*) *Bold* v. *Rayner* (1836) 1 M. & W. 343.
(*e*) *Kearon* v. *Pearson* (1861), 7 H. & N. 386; 31 L. J. (EX.) 1.
(*f*) *The Jaederen*, [1892] P. 351.
(*g*) *Falkner* v. *Earle* (1863), 32 L. J. (Q. B.) 124.
(*h*) *Budgett & Co.* v. *Binnington & Co.* (1890), 25 Q. B. D. 320; affirmed, [1891] 1 Q. B. 35, C. A.
(*i*) *Ropner & Co.* v. *Stoate Hosegood & Co.* (1905), 92 L. T. 328.
(*k*) *Aktieselskabet Hekla* v. *Bryson, Jameson & Co.* (1908), 100 L. T. 155.
(*l*) *Holderness* v. *Collinson* (1827), 7 B. & C. 212.
(*m*) *Brown* v. *Johnson* (1842), 10 M. & W. 331. For the meaning of "days" in the port of London, see *Cochran* v. *Retberg* (1800), 3 Esp. 121.
(*n*) *Leidemann* v. *Schultz* (1853), 14 C. B. 38.
(*o*) *Lawson* v. *Burness* (1862), 1 H. & C. 396.
(*p*) *Northmoor Steamship Co.* v. *Harland and Wolff, Ltd.*, [1903] 2 I. R. 657.

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**550.** In the port of Gloucester usages are recognised that the usual place of discharge for ships with grain cargoes is at the basin within the city, and when vessels carrying cargoes of this description and destined for Gloucester are of too heavy a burden to come up the canal they are lightened at Sharpness; and that during the necessary lightening of the cargo at Sharpness the lay-days are counted, but that the time occupied in coming up the canal to discharge at Gloucester Basin, and in returning to Sharpness, is not counted (*q*); in the port of Sharpness, to discharge timber cargoes into lighters to be taken up the canal to Gloucester (*r*). An attempt to establish a usage of the last-named port that if steamers be unloaded at a certain rate of speed they must be regarded as being properly discharged, no matter how large they be, has failed on the ground that such a usage would be unreasonable (*s*). Gloucester.

**551.** In the port of Middlesborough-on-the-Tees a usage has been established for the ship's master to discharge timber cargoes over the ship's sides and to form it into rafts, and for the consignees to send steam tugs to tow it away (*t*). Middlesborough.

**552.** A usage of the port of Garston has been upheld for a dock company in that port to undertake the whole work of discharging cargoes, both the share of the work which ordinarily falls on the shipowners and that which ordinarily falls on the charterers (*u*); in the port of Grimsby, as to the berth at which ships load coal (*x*), and as to the discharge of timber cargoes (*a*); at the port of Newlyn, in Cornwall, to load stone cargoes by means of carts from the quarries (*b*); at the port of Fowey, as to turns of loading vessels at the jetties (*c*). A usage has been recognised in the port of Great Yarmouth, in Norfolk, that a shipowner must deliver the cargo on the quay, and therefore must bear any expense connected with the discharge of the cargo between the ship's rails and the quay (*d*); and in the port of Lowestoft, for vessels to discharge a portion of their cargo outside the port in the roads, if they are of too great a draught to admit of their entering the harbour (*e*); in the port of Whitehaven, to load sailing vessels with coal according to the order in which they have arrived at the port, and to give preference to steamers (*f*); in the port of Wells, that time does not commence to run against the charterer until the ship actually reaches the quay (*g*); in the port of Cardiff, as to the mode of loading steamers with iron (*h*), Other ports.

(*q*) *Nielsen* v. *Wait* (1885), 16 Q. B. D. 67, C. A.; *Reynolds* v. *Tomlinson*, [1896] 1 Q. B. 586.
(*r*) *The Alne Holme*, [1893] P. 173.
(*s*) *Sea Steamship Co.* v. *Price, Walker & Co.* (1903), 8 Com. Cas. 292.
(*t*) *Thiis* v. *Byers* (1876), 1 Q. B. D. 244.
(*u*) *Castlegate Steamship Co.* v. *Dempsey*, [1892] 1 Q. B. 854, C. A.
(*x*) *Monsen* v. *Macfarlane & Co.*, [1895] 2 Q. B. 562, C. A.
(*a*) *Stephens* v. *Winteringham* (1898), 3 Com. Cas. 169.
(*b*) *Temple, Thomson and Clarke* v. *Runnalls* (1902), 18 T. L. R. 822, C. A
(*c*) *The Sheila*, [1909] P. 31, n.
(*d*) *The Nifa*, [1892] P. 411.
(*e*) *The Alhambra* (1881), 6 P. D. 68.
(*f*) *King* v. *Hinde* (1883), 12 L. R. Ir. 113.
(*g*) *Brereton* v. *Chapman* (1831), 7 Bing. 559; 5 Moo. & P. 526.
(*h*) *Coverdale* v. *Grant* (1883), 11 Q. B. D. 543, C. A.; *sub nom. Grant & Co.*

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and for the supply of railway waggons to convey cargoes from ships (*i*).

SUB-SECT. 2.—*Usages of Foreign and Colonial Ports.*

Established usages of foreign and colonial ports.

**553.** In addition to the usages of English ports, many foreign ports, including the ports of British colonies, have usages which have been adjudicated upon or recognised in English courts as affecting merchant shippers, underwriters, brokers, and others in this country. Thus, a usage has been established in the port of Newcastle, New South Wales, that vessels cannot obtain a loading berth for coal until a coaling order has been lodged with the port authority (*k*), and that vessels cannot obtain a loading berth until they have received a loading order from a colliery (*l*); in Trinidad, that ships pay for lighterage, and the shipowner must allow the charterer the reasonable expense of this outgoing (*m*); in Jamaica, that ships carrying goods to certain places proceed to an adjoining port, and there transfer the goods into shallops to be taken to their destinations (*n*), and that goods are put on board at the expense of the owners of the ship (*o*); in Mauritius, to make up cargoes by obtaining goods for shipment from several houses (*p*), and for ships to anchor at a certain buoy outside the Swan River (*q*); in the port of Wilmington, in Carolina, to omit fractions in computing sales of resin in order to facilitate the computation of the weight of cargoes (*r*); in the port of Gothenburg, as to the mode of measuring timber cargoes (*s*); in the port of Oporto for ships to load a part of their cargo outside the bar, when, owing to the state of the river, they cannot load their full cargo inside (*t*); in the port of Archangel, to seal down ship's hatches, and for the cargo to be taken to certain warehouses until the duties have been paid (*a*); in St. Mary's River, Florida, for ships to take in outgoing cargoes partly at one spot and partly at another (*b*); in the port of Gibraltar, for goods to be placed on a store ship, and for the store ship to be regarded as a warehouse (*c*); in the port of Canton, for ships to unbend their rigging, sails, and other gear, and to store them ashore for repairing purposes while the ships are being cleaned and refitted (*d*); in the port of Hamburg, for ships with certain cargoes to occupy two berths

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v. *Coverdale, Todd & Co.* (1884), 9 App. Cas. 470; *Kay* v. *Field* (1882), 8 Q. B. D. 594; S. C. (reversed) 10 Q. B. D. 241, C. A.

(*i*) *Lyle Shipping Co.* v. *Cardiff Corporation* (1899), 69 L. J. (Q. B.) 93; S. C., [1900] 2 Q. B. 639, C. A.

(*k*) *Jones, Ltd.* v. *Green & Co.*, [1904] 2 K. B. 275, C. A.; *Barque Quilpué, Ltd.* v. *Brown*, [1904] 2 K. B. 264.

(*l*) *Arden Steamship Co., Ltd.* v. *Andrew Weir & Co.*, [1905] A. C. 501.

(*m*) *Scrutton* v. *Childs* (1877), 36 L. T. 212.

(*n*) *Stewart* v. *Bell* (1821), 5 B. & Ald. 238.

(*o*) *Curling* v. *Long* (1797), 1 Bos. & P. 634.

(*p*) *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395.

(*q*) *Lindsay* v. *Janson* (1859), 4 H. & N. 699.

(*r*) *Fullagsen* v. *Walford* (1883), Cab. & El. 198.

(*s*) *The Scandinav* (1881), 51 L. J. (P.) 93, C. A.

(*t*) *Kingston* v. *Knibbs* (1808), 1 Camp. 508, n.

(*a*) *Brown* v. *Carstairs* (1811), 3 Camp. 160.

(*b*) *Moxon* v. *Atkins* (1812), 3 Camp. 199.

(*c*) *Tierney* v. *Etherington* (1743), cited 1 Burr. 348.

(*d*) *Pelly* v. *Royal Exchange Assurance Co.* (1757), 1 Burr. 341.

SECT. 3. "Customs of the Port."

opposite certain warehouses upon the quay, and for the cargoes to be discharged by cranes into these warehouses (*e*); in Ceylon, for the words "lawful merchandise" to mean goods usually shipped at the port (*f*); in the Chilian ports of Iquique (*g*) and Poti (*h*), to send nitrate direct from the mines to the ship's side by rail; at Port Vendres, to discharge certain cargoes at a particular spot (*i*); in the port of Sulinah, on the Danube, to store grain cargoes higher up the river, and to bring the grain down by lighters to that port (*k*); in the port of Paraiba, an out port of Pernambuco, that, if cotton be loaded instead of sugar, 928 lbs. of cotton are to be taken as equal to a ton of sugar (*l*); in the port of Memel, for the captains of ships to take delivery of the timber which they are about to carry from the port, when the timber is in timber ponds some distance up the river, and for the timber to be rafted down to the ships partly at the expense of the ship and partly at the expense of the shipper at the risk of the shipowner during the process of rafting down (*m*); in the port of Bangor, Maine, U.S.A., to load wet wood-pulp in winter in a frozen condition (*n*); in the port of Charlestown, to compress bales of cotton wool by machinery to facilitate stowage in the ship (*o*); in the port of New Orleans, to compress all cotton leaving the port before stowing the cotton on board, unless the ship is unable to get a full cargo when the cotton is put on board uncompressed (*p*); in the port of Valparaiso, for days when the surf on the beach is too heavy to allow of lighters landing cargoes (called "surf days") to be excluded from "weather working days" (*q*); in the port of Sydney, that wool arriving for shipment is not delivered directly at the ship for which it is intended, but taken to the store-houses of the stevedores, where it is pressed by hydraulic rams to minimise its bulk (*r*); in the port of Demerara, for large vessels to take in part of their cargoes in the river, and then to drop down over the bar and to take in the rest, leaving their papers in the meanwhile at the custom house (*s*); in the port of Bunbury, near Freemantle, Western Australia, for vessels to load part of their cargoes at a jetty, and then to proceed into deeper water to take in the remainder (*t*); in the port of Odessa, that, for

(*e*) *Good & Co.* v. *Isaacs*, [1892] 2 Q. B. 555, C. A.
(*f*) *Vanderpar & Co.* v. *Duncan & Co.*, [1891] W. N. 178.
(*g*) *Smith and Service* v. *Rosario Nitrate Co.*, [1893] 2 Q. B. 323; S. C. affirmed, [1894] 1 Q. B. 174, C. A.
(*h*) *Furness* v. *Forwood Brothers & Co.* (1897), 13 T. L. R. 500.
(*i*) *Sanders* v. *Jenkins*, [1897] 1 Q. B. 93.
(*k*) *Hudson* v. *Ede* (1867), L. R. 2 Q. B. 566; see *Allerton Sailing Ship Co.* v. *Falk* (1888), 6 Asp. M. L. C. 287. A case referring to Birkenhead.
(*l*) *Duckett* v. *Satterfield* (1868), L. R. 3 C. P. 227.
(*m*) *Lishman* v. *Christie* (1887), 19 Q. B. D. 333, C. A.
(*n*) *The Steamship Isis Co.* v. *Bahr & Co.*, [1899] 2 Q. B. 364, C. A., affirmed, [1900] A. C. 340.
(*o*) *Benson* v. *Schneider* (1817), 7 Taunt. 272.
(*p*) *Ibid.*
(*q*) *Bennetts & Co.* v. *Brown*, [1908] 1 K. B. 490, where, however, evidence of the usage was held inadmissible.
(*r*) *Australian Agricultural Co.* v. *Saunders* (1875), L. R. 10 C. P. 668, Ex. Ch.
(*s*) *Lang* v. *Anderdon* (1824), 3 B. & C. 495.
(*t*) *Aktieselskabet Inglewood* v. *Millar's Karri and Jarrah Forests* (1903), 8 Com. Cas. 196.

SECT. 3. "Customs of the Port."

the purposes of estimating demurrage and damages for detention, a vessel is not to be regarded as ready to receive a cargo or as ready to commence loading till she is actually in her berth alongside the quay (*a*); and as to the usual place for ships to take in cargo in the island of Graciosa (*b*).

Usages not established.

**554.** An attempt to establish a usage in the port of Onega, in the White Sea, to restrict the quantity of cargo loaded each day to a certain quantity has failed for want of proof (*c*); so also has an attempt to set up a usage in Alexandria as to the form of a bill of lading (*d*). A usage has been alleged in the port of Bombay for the receipts for goods shipped on board a vessel and given by the mate to be treated as negotiable instruments, and to pass the property in the goods, but, although not actually held bad, this usage has not been directly sanctioned (*e*).

SECT. 4.—*Usages affecting Shippers Generally.*

Established usages.

**555.** There is a usage amongst shippers, that where a charter-party binds the charterer to find a full cargo of sugar $\frac{\text{and}}{\text{or}}$ molasses at Trinidad, and the charter is silent as to the broken stowage, the merchant's obligation extends no further than to ship as many hogsheads of sugar and puncheons of molasses as the ship will conveniently hold (*f*); for merchants shipping sulphuric acid to give notice of the nature of the contents of the shipment to the shipowner (*g*); as to the scale of freights for the Baltic trade (*h*); that the word "about" a certain number when used in charterparties drawn in a certain form gives the shipmaster a latitude of 10 per cent. from that specified number (*i*); that a captain's salary includes all gratuities such as primage (*j*); for a ship-master to receive a small payment from a merchant on delivery of his goods, for care and attention bestowed upon them (*k*); for the servants of a dock company to bring the cargo in the ship's hold under the open hatchway (*l*), and to tighten moorings becoming slack by a vessel sinking in the water as her loading proceeds (*m*). Usages to stow cotton on deck between New Orleans and Liverpool (*n*) and to stow pigs on deck on a voyage from Waterford to London (*o*) have failed for want of proof.

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(*a*) *Hick* v. *Tweedy & Co.* (1890), 63 L. T. 765.
(*b*) *Cockey* v. *Atkinson* (1819), 2 B. & Ald. 460.
(*c*) *Metcalfe, Simpson & Co.* v. *Thompson, Pattrick and Woodwark* (1902), 18 T. L. R. 706.
(*d*) *Rodocanachi* v. *Milburn* (1886), 18 Q. B. D. 67, C. A.
(*e*) *Hathesing* v. *Laing* (1873), L. R. 17 Eq. 92.
(*f*) *Cuthbert* v. *Cumming* (1855), 10 Exch. 809; S. C. (affirmed) 11 Exch. 405, Ex. Ch.
(*g*) *Alston* v. *Herring* (1856), 11 Exch. 822.
(*h*) *Russian Steam-Navigation Co.* v. *Silva* (1863), 13 C. B. (N. S.) 610.
(*i*) *Alcock* v. *Leeuw & Co.* (1883), Cab. & El. 98.
(*j*) *Caughey* v. *Gordon & Co.* (1878), 3 C. P. D. 419.
(*k*) *Charleton* v. *Cotesworth* (1825), Ry. & M. 175.
(*l*) *Grange & Co.* v. *Taylor* (1904), 20 T. L. R. 386.
(*m*) *Loader* v. *London and India Docks Joint Committee* (1891), 65 L. T. 674.
(*n*) *Royal Exchange Shipping Co.* v. *Dixon* (1886), 12 App. Cas. 11; *Newall* v. *Royal Exchange Shipping Co.* (1885), 33 W. R. 868.
(*o*) *Milward* v. *Hibbert* (1842), 3 Q. B. 120.

## SECT. 5.—*Usages affecting Maritime Insurance.*

SECT. 5. Usages affecting Maritime Insurance.

**556.** Numerous maritime usages have been upheld affecting the contractual relationships created by maritime insurance policies and maritime insurance generally (*p*).

Convoys.

A usage for merchant ships in time of war to assemble at the place previously appointed for the rendezvous of a convoy has been recognised (*q*); for ships sailing under convoy from England to the West Indies to look in at St. Eustatia on their way to St. Kitts, to take up any ships which might be there (*r*).

Newfoundland trade.

A usage for ship-masters engaged in the Newfoundland trade to keep their inward cargoes on board several months after their arrival, and only to unload the same when not engaged in fishing and loading their outward cargoes (*s*); for shipowners in that trade to employ their ships after arrival there from this country in fishing or intermediate voyages before taking in cargoes for the return voyage (*t*).

Liverpool.

A usage for Liverpool insurance brokers not to send policies to their principals, but to sign their principals' names to the policies, and for a secret limit to be put on the amount for which such a broker may sign his principal's name (*a*); for underwriters in Liverpool, where a policy of insurance is in general terms, not to be liable for general average or contribution in respect of the jettison of goods which, instead of being stowed below, are stowed on deck (*b*).

Ship to be hereafter declared.

There is a usage that when a policy is effected on goods by a ship to be thereafter declared, the policy attaches to the goods as soon as and in the order in which they are shipped, and that directly the assured knows of the shipment of the goods he is bound to declare them to the underwriter on the policy, and to declare them in the order in which they are shipped, and is not entitled to declare some of the risks and to remain his own insurer as to the others, and that in case by oversight or otherwise the goods are declared on the policy in an order different from that in which they were shipped, the assured is bound to rectify the declarations and make them correspond with the order of shipment (*c*).

Miscellaneous usages.

There are usages for ships sailing from the Baltic to America to touch at Elsinore for provisions (*d*); for ships sailing from London to Nantz with liberty to call at Ostend to sail direct to Nantz in

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(*p*) For the law of maritime insurance generally, see title INSURANCE.

(*q*) *Lethulier's Case* (1692), 2 Salk. 443; *Bond* v. *Gonsales* (1704), 2 Salk. 445; *Gordon* v. *Morley* (1747), 2 Stra. 1264; *Campell* v. *Bordieu* (1747), 2 Stra. 1264; *Bond* v. *Nutt* (1777), 1 Doug. (K. B.) 367, n.; *Anderson* v. *Pitcher* (1800), 2 Bos. & P. 164; *Lilly* v. *Ewer* (1779), 1 Doug. (K. B.) 72.

(*r*) *Delany* v. *Stoddart* (1785), 1 Term Rep. 22.

(*s*) *Noble* v. *Kennoway* (1780), 2 Doug. (K. B.) 510.

(*t*) *Vallance* v. *Dewar* (1808), 1 Camp. 503; *Ougier* v. *Jennings* (1800), 1 Camp. 504, n.

(*a*) *Baines* v. *Ewing* (1866), L. R. 1 Exch. 320.

(*b*) *Miller* v. *Tetherington* (1862), 7 H. & N. 954, Ex. Ch.

(*c*) *Stephens* v. *Australasian Insurance Co.* (1872), L. R. 8 C. P. 18; *Imperial Marine Insurance Co.* v. *Fire Insurance Corporation, Ltd.* (1879), 4 C. P. D. 166.

(*d*) *Cormack* v. *Gladstone* (1809), 11 East, 347.

SECT. 5. Usages affecting Maritime Insurance.

order to avoid duties in England and France (*e*); for steamers on the Rhine to carry goods on deck (*f*); for carboys of vitriol to be carried on deck on a voyage from London to Lisbon (*g*); for vessels engaged in the Baltic timber trade to carry deck cargoes (*h*); for vessels taking in cargoes in Odessa not to be regarded as ready to load until actually alongside the quay (*i*).

A usage has been recognised as valid that on a Lloyd's policy the underwriter must look to the broker and not to the assured for the payment of the premium (*j*); that a person who insures a risk at Lloyd's employs an agent who, for all purposes, unless his employer intervenes, may be dealt with as a principal by the underwriter with whom he contracts (*k*). A usage of Lloyd's has also been recognised for insurers to adopt one of two policies of insurance of live stock, one containing an exception from the perils insured against, or a warranty of freedom from mortality, and the other omitting any such warranty (*l*); for ships carrying timber from Quebec to London to stow it on deck (*m*); that an insurance for an entire voyage outwards and homewards covers intermediate voyages (*n*); for ships in the East India trade to be liable to be detained an extra year in India (*o*); that the loss in an open policy on freight shall be adjusted on the gross, and not on the net, amount of the freight (*p*); for English average adjusters in adjusting losses where a ship has put into a port to refit, whether such seeking of refuge has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average, but the expense of warehousing it as particular average on the cargo, and the other expenses necessary to enable the ship to proceed on her voyage as particular average on the freight (*q*).

Usages not established.

**557.** It has been held that there is no usage at Lloyd's excluding loss from general average where the loss is sustained by scuttling a ship in harbour to extinguish a fire (*r*); nor a usage that if the insured does not disclose the name of the ship in which the goods are expected the policy will not attach (*s*). It has also been held that a usage entitling an agent to receive a secret commission from a person whose interests are adverse to the principal for whom the

(*e*) *Planché* v. *Fletcher* (1779), 1 Doug. (K. B.) 251.
(*f*) *Apollinaris Co.* v. *Nord Deutsche Insurance Co.*, [1904] 1 K. B. 252.
(*g*) *Da Costa* v. *Edmunds* (1815), 4 Camp. 142.
(*h*) *Burton* v. *English* (1883), 12 Q. B. D. 218, C. A.
(*i*) *Hick* v. *Tweedy & Co.* (1890), 63 L. T. 765.
(*j*) *Power* v. *Butcher* (1829), 10 B. & C. 329; *Xenos* v. *Wickham* (1863), 14 C. B. (N. S.) 435, 447, Ex. Ch.; *Universo Insurance Co. of Milan* v. *Merchants Marine Insurance Co.*, [1897] 2 Q. B. 93, C. A.; *Edgar* v. *Fowler* (1803), 3 East, 222.
(*k*) *Matvieff* v. *Crosfield* (1903), 8 Com. Cas. 120.
(*l*) *Gabay* v. *Lloyd* (1825), 3 B. & C. 793.
(*m*) *Gould* v. *Oliver* (1837), 4 Bing. (N. C.) 134.
(*n*) *Gregory* v. *Christie* (1784), 3 Doug. (K. B.) 419.
(*o*) *Salvador* v. *Hopkins* (1765), 3 Burr. 1707.
(*p*) *Palmer* v. *Blackburn* (1822), 1 Bing. 61.
(*q*) *Atwood* v. *Sellar* (1879), 5 Q. B. D. 286, C. A.; see also *Svendsen* v. *Wallace* (1885), 10 App. Cas. 404.
(*r*) *Achard* v. *Ring* (1874), 31 L. T. 647.
(*s*) *Knight* v. *Cotesworth* (1883), Cab. & El. 48.

agent acts is bad (*t*). A usage that when goods are sold to be delivered free on board, the vendor cannot insist upon payment until the bill of lading or a mate's certificate or other document has been produced to the purchaser, showing that the goods have been put on board, has been alleged but not judicially established (*u*).

(*t*) *Bartram & Sons* v. *Lloyd* (1903), 88 L. T. 286; and see, generally, titles AGENCY, Vol. I., p. 189; CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 710.
(*u*) *Green* v. *Sichell* (1860), 2 L. T. 745.

# CUSTOMARY FREEHOLDS.

*See* COPYHOLDS; DESCENT AND DISTRIBUTION; SALE OF LAND.

# CUSTOMS DUTIES.

*See* REVENUE.

# CY-PRES DOCTRINE.

*See* CHARITIES; WILLS.

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# DAMAGE FEASANT.

*See* ANIMALS.

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# DAMAGES.

[N.B.—This article deals only with the general principles of the law of damages; for particular cases reference must be made to the various titles of this work.—EDS.]


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*Damages in respect of particular relations, e.g.*, AGENCY; CARRIERS; CONTRACT; LANDLORD AND TENANT; LIBEL AND SLANDER; MASTER AND SERVANT; MINES, MINERALS AND QUARRIES; NEGLIGENCE; NUISANCE; SALE OF GOODS; SALE OF LAND; TORT; TRESPASS; TROVER AND CONVERSION - - - - *See respective titles.*

# Part I.—Definition, Nature and Classification.

Definition.

**558.** Damages may be defined as the pecuniary compensation which the law awards to a person (*a*) for the injury he has sustained by reason of the act or default of another, whether such act or default is a breach of contract or a tort; or, put more shortly, damages are the recompense given by process of law to a person for the wrong that another has done him (*b*).

*Restitutio in integrum.*

**559.** The great underlying principle by which the courts are guided in awarding damages is *restitutio in integrum* (*c*). By this is meant that the law will endeavour, so far as money can do it, to place the injured person in the same situation as if the contract had been performed (*d*), or in the position he occupied before

(*a*) As to the persons who may sue and be sued, see generally title ACTION, Vol. I., pp. 17 *et seq.*; and for the particular cases in which damages are recoverable, see the various titles of this work.

(*b*) See Co. Litt. 257 a; 2 Bl. Com. 438.

(*c*) *The Argentino* (1888), 13 P. D. 191, C. A., *per* BOWEN, L.J., at pp. 200, 201, and *per* Lord ESHER, M.R., at p. 196; referring to *The Columbus* (1849), 3 Wm. Rob. 158, *per* Dr. LUSHINGTON, at p. 162. In *The Mediana*, [1900] A. C. 113, Lord HALSBURY, L.C., at p. 116, said: "The whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages; nevertheless it is remitted to the jury, or those who stand in the place of the jury, to consider what compensation shall be given in money for what is a wrongful act. Take the most familiar and ordinary case: how is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident . . . nevertheless the law recognises that as a topic upon which damages can be given." Compare *Rodocanachi* v. *Milburn* (1886), 18 Q. B. D. 67, C. A., *per* LINDLEY, L.J., at p. 78: "It must be remembered that the rules as to damages can in the nature of things only be approximately just, and that they have to be worked out, not by mathematicians, but by juries"; see also *Hobbs* v. *London and South Western Rail. Co.* (1875), L. R. 10 Q. B. 111, *per* BLACKBURN, J., at p. 121.

(*d*) *Robinson* v. *Harman* (1848), 1 Exch. 850, *per* PARKE, B., at p. 855; *Bain*

the occurrence of the tort (*e*) which adversely affects him. This general principle is, however, qualified in certain cases where the law, by awarding exemplary damages, seeks not merely to give compensation to the injured party, but also allows the party in default to be punished (*f*).

The principle of *restitutio in integrum* is largely theoretical, being the ideal or standard at which the law is supposed to aim, but which in practice is rarely attained (*g*). As regards breaches of contract it may be possible in some cases to measure the damages with a fair approach to accuracy (*h*), but more frequently the damages awarded are not commensurate with the loss sustained (*i*). Thus, where the breach of contract arises upon the non-payment of money by a debtor to a creditor by a certain day, the damages incurred in consequence of the non-payment may be enormous, but the measure of the damages which the injured party is entitled to recover, in the absence of special circumstances giving rise to a right to recover special damages (*k*), is a reasonable compensation for the non-performance of the contract, which in practice is settled on the principle of allowing interest, and nothing more, in addition to the recovery of the debt (*l*). As regards torts, though in the case of torts to property it may be possible to assess the damages accurately (*m*), in the case of personal torts damages are not given to the full extent of a perfect compensation or equivalent to the mischief done (*n*).

General damages.

**560.** General damages are those which the law implies in every breach of contract (*o*) and in every violation of a legal right (*p*).

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v. *Fothergill* (1874), L. R. 7 H. L. 158, *per* Lord CHELMSFORD, at p. 207; *Gray* v. *Fowler* (1873), L. R. 8 Exch. 249, Ex. Ch.; *France* v. *Gaudet* (1871), L. R. 6 Q. B. 199; *The Argentino* (1888), 13 P. D. 191, C. A., *per* Lord ESHER, M.R., at p. 197.

(*e*) *Phillips* v. *London and South Western Rail. Co.* (1879), 5 Q. B. D. 78, C. A., *per* JAMES, L.J., at p. 87; *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25, *per* Lord BLACKBURN, at p. 39; *The Mediana*, [1900] A. C. 113, 119, explaining *The City of Peking* (1890), 15 App. Cas. 438, P. C.

(*f*) See pp. 306 *et seq.*, *post*.

(*g*) See pp. 331 *et seq.*, *post*.

(*h*) See pp. 332 *et seq.*, *post*.

(*i*) See pp. 311 *et seq.*, *post*.

(*k*) Such as existed in *Prehn* v. *Royal Bank of Liverpool* (1870), L. R. 5 Exch. 92; see further, pp. 313 *et seq.*, *post*.

(*l*) *Fletcher* v. *Tayleur* (1855), 17 C. B. 21, *per* WILLES, J., at p. 29: "whatever may be the amount of inconvenience sustained by the plaintiff the measure of damages is the interest of the money only"; *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L. R. 3 C. P. 499, *per* BOVILL, C.J., at p. 506; *Wallis* v. *Smith* (1882), 21 Ch. D. 243, C. A., *per* JESSEL, M.R., at p. 257; *Re English Bank of the River Plate, Ex parte Bank of Brazil*, [1893] 2 Ch. 438, *per* CHITTY, J., at p. 446,

(*m*) See pp. 340 *et seq.*, *post*.

(*n*) *Armsworth* v. *South Eastern Rail. Co.* (1847), 11 Jur. 758, *per* PARKE, B., at p. 760; *Rowley* v. *London and North Western Rail. Co.* (1873), L. R. 8 Exch. 221, Ex. Ch., *per* BRETT, J., at p. 230; *Phillips* v. *London and South Western Rail. Co.* (1879), 5 Q. B. D. 78, C. A.; *Johnston* v. *Great Western Rail.*, [1904] 2 K. B. 250, C. A.

(*o*) *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415; see p. 308, *post*.

(*p*) *Ashby* v. *White* (1703), 2 Ld. Raym. 938, 3 *ibid.*, 320; 1 Smith, L. C.,

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For the law presumes in such cases that some damage will flow in the ordinary course of events from the defendant's act (*q*).

**561.** The term "special damage" is used in various different senses (*r*):—

Special damage.

(1) When contrasted with general damage it means the particular damage, beyond the general damage, which results from the particular circumstances of the case and of the injured party's claim to be compensated (*s*).

(2) Where the damage actually done is the gist of the action (*t*), no actual and positive right, apart from the damage done, being disturbed, the term "special damage" (*u*) denotes the actual and temporal loss which has in fact occurred (*a*).

(3) The term "special damage" is also used in actions brought in respect of a public nuisance, such as the obstruction of a river or of a highway, to denote the actual and particular loss sustained by the plaintiff in such an action beyond what is sustained by the general public, such particular loss being his cause of action (*b*).

(4) In the case of tort, however, special damage is more frequently used to denote an actual loss suffered in addition to the wrong for which general damages are awarded to the injured party —damages that can be laid and proved in terms of figures (*c*).

Liquidated and unliquidated damages.

**562.** By the term "liquidated damages" (*d*) is meant, in the first place, a sum assessed by the parties to a contract (*e*) and agreed upon by them to be paid as damages by the party who is in default (*f*). The term is also applied to sums expressly made recoverable as liquidated damages under a statute (*g*).

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11th ed., 240, *per* Lord HOLT, C.J., at p. 261; *Hiort* v. *London and North Western Rail. Co.* (1879), 4 Ex. D. 188, C. A., *per* BRAMWELL, L.J., at p. 193; *The Mediana*, [1900] A. C. 113, *per* Lord HALSBURY, L.C., at p. 118; compare *Bayliss* v. *Fisher* (1830), 7 Bing. 153.

(*q*) See p. 308, *post*.

(*r*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A., *per* BOWEN, L.J., at p. 528.

(*s*) *Ibid.*

(*t*) *Ratcliffe* v. *Evans*, *supra*, *per* BOWEN, L.J., at p. 532; *Bradshaw* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 C. P. 189, following *Potter* v. *Metropolitan District Rail. Co.* (1874), 30 L. T. 765; *Finlay* v. *Chirney*, 20 Q. B. D. 494; compare *Lucas* v. *Tarleton* (1858), 3 H. & N. 116. See also p. 347, *post*.

(*u*) Also called in old authorities (*Ratcliffe* v. *Evans*, *supra*, *per* BOWEN, L.J., at p. 528, citing the cases following) "express loss," "particular damage" (*Cane* v. *Golding* (1649), Sty. 169, 176), "damage in fact," "special or particular cause of loss" (*Law* v. *Harwood* (1628), Cro. Car. 140; *Tasburgh* v. *Day* (1618), Cro. Jac. 484).

(*a*) *Ratcliffe* v. *Evans*, *supra*, *per* BOWEN, L.J., at p. 528.

(*b*) *Ibid.* See also *Iveson* v. *Moore* (1699), 1 Ld. Raym. 486; *Rose* v. *Groves* (1843), 5 Man. & G. 613; *Soltau* v. *De Held* (1851), 2 Sim. (N. S.) 133.

(*c*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524; *France* v. *Gaudet* (1871), L. R. 6 Q. B. 199, *per* MELLOR, J., at pp. 204-5; *Bodley* v. *Reynolds* (1846), 8 Q. B. 779.

(*d*) For the distinction between "liquidated damages" and "penalties," see pp. 328 *et seq.*, *post*.

(*e*) *Wallis* v. *Smith* (1882), 21 Ch. D. 243, C. A., *per* COTTON, L.J., at p. 267.

(*f*) See the cases cited at pp. 328 *et seq.*, *post*, and compare *Workman, Clark & Co., Ltd.* v. *Lloyd Brazileño*, [1908] 1 K. B. 968, C. A.

(*g*) See, for instance, Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61),

Damages are termed unliquidated when they have not been assessed beforehand by the parties or some statute, in which case the jury are at liberty, subject to the rules governing the measure of damages (*h*), to award such damages as they think the plaintiff has sustained (*i*).

Nominal damages.

**563.** Where (1) a plaintiff against whom a breach of duty has been committed has not in fact sustained any actual damage therefrom (*k*), or fails to prove that he has (*l*); or (2) although the plaintiff has sustained actual damage, such damage arises not from the defendant's wrongful act (*m*), but from the conduct of the plaintiff himself (*n*); or (3) the plaintiff is not concerned to raise the question of actual loss (*o*), but brings his action simply with the view of establishing his right (*p*), the damages which he is entitled to receive are called nominal.

Nominal damages have been defined as a sum of money that may be spoken of but that has no existence in point of quantity (*q*), or a mere peg on which to hang costs. In practice, however, a small sum of money is awarded, usually forty shillings (*r*). Such damages must be distinguished from small (*s*) or contemptuous damages (*t*), which indicate the opinion of the jury that the action ought not to have been brought.

Statutory damages.

**564.** The term "statutory damages" may mean either the

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s. 57 (1); and title BILLS OF EXCHANGE ETC., Vol. II., p. 524; and compare R. S. C., Ord. 3, r. 6; *Workman, Clark & Co., Ltd.* v. *Lloyd Brazileño*, [1908] 1 K. B. 968, C. A.

(*h*) As to these see pp. 331 *et seq.*, *post.*

(*i*) *Hurst* v. *Hurst* (1849), 4 Exch. 571, *per* PARKE, B., at p. 580.

(*k*) See, for instance, *West* v. *Houghton* (1879), 4 C. P. D. 197; *Northam* v. *Hurley* (1853), 1 E. & B. 665; *Columbus Co.* v. *Clowes*, [1903] 1 K. B. 244; *Ashdown* v. *Ingamells* (1880), 5 Ex. D. 280, C. A. The remedy where a party sues who has suffered no inconvenience is to deprive him of costs (*Marzetti* v. *Williams* (1830), 1 B. & Ad. 415, *per* PARKE, J., at p. 425; *Hiort* v. *London and North Western Rail. Co.* (1879), 4 Ex. D. 188, C. A., *per* BRAMWELL, L.J., at p. 196; *Nicolas* v. *Atkinson* (1909), 25 T. L. R. 568).

(*l*) *Twyman* v. *Knowles* (1853), 13 C. B. 222; *Marzetti* v. *Williams*, *supra.*

(*m*) *Hiort* v. *London and North Western Rail Co.*, *supra*; *Sanders* v. *Stuart* (1876), 1 C. P. D. 326.

(*n*) *Warre* v. *Calvert* (1837), 7 Ad. & El. 143, *per* Lord DENMAN, C.J., at p. 154; *Hamlin* v. *Great Northern Rail Co.* (1856), 1 H. & N. 408.

(*o*) *Mellor* v. *Spateman* (1669), 1 Wms. Saund. 343, 346 a.

(*p*) *Northam* v. *Hurley*, *supra*; *Medway Co.* v. *Romney* (*Earl*) (1861), 9 C. B. (N. S.) 575; *Embrey* v. *Owen* (1851), 6 Exch. 353.

(*q*) *Beaumont* v. *Greathead* (1846), 2 C. B. 494, *per* MAULE, J., at p. 499, where, however, the claim was for nominal damages for non-payment of a sum due, and the court held that when the sum due was paid or tendered, this was equivalent to payment or tender of nominal damages also.

(*r*) See, for instance, *Harrop* v. *Hirst* (1868), L. R. 4 Exch. 43; *Columbus Co.* v. *Clowes*, *supra.* Other sums awarded as nominal damages are: twenty shillings (*Jones* (*James*) *& Sons, Ltd.* v. *Tankerville* (*Earl*) (1909), 25 T. L. R. 714, 716); a shilling (*Hiort* v. *London and North Western Rail Co.*, *supra*; *Warre* v. *Calvert*, *supra*; and see *Dicks* v. *Brooks* (1880), 15 Ch. D. 22, *per* BRAMWELL, L.J., at pp. 40, 41; *Twyman* v. *Knowles*, *supra*); and a farthing (*Mostyn* v. *Coles* (1862), 7 H. & N. 872), though the latter sum is generally reserved for contemptuous damages.

(*s*) *The Mediana*, [1900] A. C. 113, *per* Lord HALSBURY, L.C., at p. 116.

(*t*) *Cooke* v. *Brogden & Co.* (1885), 1 T. L. R. 497; *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. 686.

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remedy in damages provided by some particular statute under which the action is brought (*u*), or such damages as are awarded for the direct infringement of the provisions of a statute, or for neglect of a statutory duty (*w*).

Prospective damages.

**565.** The term "prospective damages" is applied to the damages which are awarded to a plaintiff, not as compensation for the ascertained loss which he has sustained at the time of commencing his action, but in respect of loss which it may reasonably be anticipated he will suffer thereafter in consequence of the defendant's act or omission (*x*).

Exemplary damages.

**566.** Where the wounded feeling and injured pride of a plaintiff (*y*), or the misconduct of a defendant, may be taken into consideration, the principle of *restitutio in integrum* (*z*) no longer applies (*a*). Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner (*b*), and vindicate the distinction between a wilful and an innocent wrongdoer (*c*). The damages so awarded have been variously called exemplary (*d*), vindictive (*e*), penal (*f*), punitive (*g*), aggravated (*h*), or retributory (*i*).

Except in the case of breach of promise of marriage (*k*),

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(*u*) See, for instance, Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93). Such statutory damages fall outside the scope of this article, and will be found dealt with under the different titles; see, for example, titles BILLS OF EXCHANGE ETC., Vol. II., p. 523; NEGLIGENCE; SALE OF GOODS.

(*w*) See *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859), 6 C. B. (N. S.) 336, *per* WILLES, J., at p. 356; *Great Northern Fishing Co.* v. *Edgehill* (1883), 11 Q. B. D. 225. As to the difference between the meaning of the word "compensation" when used in a statute and damages, see *Dixon* v. *Calcraft*, [1892] 1 Q. B. 458, C. A., *per* Lord ESHER, M.R., at p. 463; and compare *Smith* v. *Brown* (1871), L. R. 6 Q. B. 729.

(*x*) *Richardson* v. *Mellish* (1824), 2 Bing. 229; *Hodsoll* v. *Stallebrass* (1840), 11 Ad. & El. 301; *Mason* v. *Barker* (1843), 1 Car. & Kir. 100; *Clegg* v. *Dearden* (1848), 12 Q. B. 576; *Phillips* v. *London and South Western Rail. Co.* (1879), 5 Q. B. D. 78, C. A.; *Lambkin* v. *South Eastern Rail. Co.* (1880), 5 App. Cas. 352; *Brunsden* v. *Humphrey* (1884), 14 Q. B. D. 141, C. A.; *Emery (George D.) Co.* v. *Wells*, [1906] A. C. 515, P. C.; compare *Robinson* v. *Bland* (1760), 2 Burr. 1077, 1087. See also pp. 309, 310, *post*.

(*y*) *Berry* v. *Da Costa* (1866), L. R. 1 C. P. 331, *per* WILLES, J., at p. 333.

(*z*) See p. 302, *ante*.

(*a*) *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25, *per* Lord BLACKBURN, at p. 39; *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351, 364, P. C.

(*b*) *Finlay* v. *Chirney* (1888), 20 Q. B. D. 495, C. A., *per* BOWEN, L.J., at p. 504; compare *Dreyfus* v. *Peruvian Guano Co.* (1889), 42 Ch. D. 66.

(*c*) *Bulli Coal Mining Co.* v. *Osborne supra*; *Williams* v. *Currie* (1845), 1 C. B. 841, *per* MAULE, J., at p. 847.

(*d*) *Merest* v. *Harvey* (1814), 5 Taunt. 442, *per* HEATH, J., at p. 443; *Emblen* v. *Myers* (1860), 6 H. & N. 54, *per* POLLOCK, C.B., at p. 58; *Finlay* v. *Chirney*, *supra*, *per* BOWEN, L.J., at p. 507.

(*e*) *Emblen* v. *Myers*, *supra*; *Crouch* v. *Great Northern Rail. Co.* (1856), 11 Exch. 742, *per* MARTIN, B., at p. 759.

(*f*) *McArthur & Co.* v. *Cornwall*, [1892] A. C. 75, 88, P. C.

(*g*) *The Mediana*, [1900] A. C. 113, *per* Lord HALSBURY, L.C., at p. 118.

(*h*) *Clark* v. *Newsam* (1847), 1 Exch. 131, *per* POLLOCK, C.B., at p. 140.

(*i*) *Bell* v. *Midland Rail. Co.* (1861), 10 C. B. (N. S.) 287, *per* BYLES, J., at p. 308.

(*k*) *Smith* v. *Woodfine* (1857), 1 C. B. (N. S.) 660; *Berry* v. *Da Costa*, *supra*;

exemplary damages cannot be awarded in an action for breach of contract (*l*), since the existence of misconduct cannot alter the rule by which the damages for breach of contract are assessable (*m*). Such damages may, however, be awarded in an action for tort, as, for instance, assault (*n*), trespass (*o*), negligence (*p*), nuisance (*q*), libel (*r*), slander (*a*), seduction (*b*), malicious prosecution (*c*), and false imprisonment (*d*).

In order to justify the award of exemplary damages, it is not sufficient to show merely that the defendant has committed a wrongful act (*e*). The conduct of the defendant (*f*) must be high-handed (*g*), insolent (*h*), vindictive (*i*), or malicious (*j*), showing a contempt of

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*Finlay* v. *Chirney* (1888), 20 Q. B. D. 495 C. A., *per* BOWEN, L.J., at p. 504; *Millington* v. *Loring* (1880), 6 Q. B. D. 190, C. A.; see further, p. 323, *post*.

(*l*) *Berry* v. *Da Costa* (1866), L. R. 1 C. P. 331, *per* WILLES, J., at p. 334; *Hamlin* v. *Great Northern Rail. Co.* (1856), 1 H. & N. 408, *per* POLLOCK, C.B., at p. 411. The cases as to dishonouring a cheque or draft (see, for instance, *Larios* v. *Gurety* (1873), L. R. 5 P. C. 346, where "substantial" damages were given, following *Rolin* v. *Steward* (1854), 14 C. B. 595), stand on a different footing; see p. 323, *post*. In *Maw* v. *Jones* (1890), 25 Q. B. D. 107 aggravated damages were held recoverable in an action for wrongful dismissal of an apprentice on a false charge of misconduct; but it is submitted that this case was wrongly decided; and in *Addis* v. *Gramophone Co., Ltd.* (1909), 127 L. T. Jo. 320, H. L., *Maw* v. *Jones*, *supra*, was considered and distinguished, and practically overruled, and it was held that actual damages only could be awarded for wrongful dismissal; see also *Austwick* v. *Midland Rail. Co.* (1909), 25 T. L. R. 728; *Baker* v. *Denkera Ashanti Mining Corporation* (1903), 20 T. L. R. 37.

(*m*) *Sikes* v. *Wild* (1861), 1 B. & S. 587, *per* BLACKBURN, J., at p. 591. But see *Smith* v. *Day* (1882), 21 Ch. D. 421, C. A., *per* BRETT, L.J., at p. 428.

(*n*) *Merest* v. *Harvey* (1814), 5 Taunt. 442, *per* HEATH, J., at p. 443; *Grey* v. *Grant* (1764), 2 Wils. 252; compare *Sharpe* v. *Brice* (1774), 2 Wm. Bl. 942.

(*o*) *Merest* v. *Harvey*, *supra*; *Williams* v. *Currie* (1845), 1 C. B. 841; *Bruce* v. *Rawlins* (1770), 3 Wils. 61; *Sears* v. *Lyons* (1818), 2 Stark. 317; *Bland* v. *Bland* (1835), 1 Har. & W. 167.

(*p*) *Emblen* v. *Myers* (1860), 6 H. & N. 54, where the plaintiff's building was injured by the reckless way in which the defendant allowed his house to be pulled down.

(*q*) See title NUISANCE.

(*r*) *Emblem* v. *Myers*, *supra*, *per* BRAMWELL, J., at p. 59; *Davis* v. *Shepstone* (1886), 11 App. Cas. 187, 191, P. C.; *Jones* v. *Hulton (E.) & Co.*, [1909] 2 K. B. 444, C. A., *per* Lord ALVERSTONE, C.J., at p. 457; and *per* FARWELL, L.J., at p. 483.

(*a*) As to the likelihood of greater damage arising from libel than from slander, see *De Crespigny* v. *Wellesley* (1829), 5 Bing. 392, *per* BEST, C.J., at p. 402.

(*b*) *Bennett* v. *Allcott* (1787), 2 Term Rep. 166; *Tullidge* v. *Wade* (1769), 3 Wils. 18, *per* WILMOT, C.J., at p. 19; *Elliott* v. *Nicklin* (1818), 5 Price, 641; *Appleby* v. *Franklin* (1885), 17 Q. B. D. 93; see further p. 324, *post*.

(*c*) *Leith* v. *Pope* (1779), 2 Wm. Bl. 1327; *Hewlett* v. *Cruchley* (1813), 5 Taunt. 277.

(*d*) *Huckle* v. *Money* (1763), 2 Wils. 205; *Beardmore* v. *Carrington* (1764), 2 Wils. 244; *Mostyn* v. *Fabrigas* (1764), 1 Cowp. 161; 1 Smith, L.C., 11th ed., 591; *Edgell* v. *Francis* (1840), 1 Man. & G. 222.

(*e*) *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25; *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351, P. C.; compare *Flemington* v. *Smithers* (1826), 2 C. & P. 292.

(*f*) In the case of joint tortfeasors, only one of whom has acted from malignant motives, the plaintiff cannot recover exemplary damages if he brings his action against both (*Clark* v. *Newsam* (1847), 1 Exch. 131).

(*g*) *Bell* v. *Midland Rail Co.* (1861), 10 C. B. (N. S.) 287, *per* WILLES, J., at p. 307.

(*h*) *Merest* v. *Harvey*, *supra*; *Huxley* v. *Berg* (1815), 1 Stark. 98.

(*i*) *Adams* v. *Coleridge* (1884), 1 T. L. R. 84, 87.

(*j*) *Livingstone* v. *Rawyards Coal Co.*, *supra*, *per* Lord CAIRNS, L.C., at p. 31;

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the plaintiff's right (*k*), or disregarding every principle which actuates the conduct of gentlemen (*l*). In particular, the defendant's persistence in the act with knowledge (*m*), and the language accompanying it (*n*), as well as his conduct at the trial of the action itself (*o*), are elements to be considered.

A plaintiff, however, who has provoked the defendant's conduct by his own, will not be entitled to exemplary damages (*p*).

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# Part II.—Rules as to Awarding Damages.

## SECT. 1.—*General Principles.*

When actual damage essential.

**567.** Every breach of duty, whether arising out of contract (*q*) or tort (*r*), gives rise to an action for damages (*s*), without proof of actual damage (*t*), though the amount of damages recoverable is, as a general rule (*u*), governed by the extent of the actual damage sustained in consequence of the defendant's act (*a*). But it is not

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*Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351, 364, P. C.; *Smith* v. *Day* (1882), 21 Ch. D. 421, C.A., *per* BRETT, L.J., at p. 428; *Wennhak* v. *Morgan* (1888), 20 Q. B. D. 635; and compare *Sears* v. *Lyons* (1818), 2 Stark. 317. Evidence of other wrongful acts on the part of the defendant may be given, notwithstanding that they disclose distinct causes of action (*Pearson* v. *Lemaitre* (1843), 5 Man. & G. 700; *Darby* v. *Ouseley* (1856), 1 H. & N. 1; and compare *Millington* v. *Loring* (1880), 6 Q. B. D. 190, C. A.).

(*k*) *Emblen* v. *Myers* (1860), 6 H. & N. 54; *per* POLLOCK, C.B., at p. 58; *Bell* v. *Midland Rail. Co.* (1861), 10 C. B. (N. S.) 287, where the defendants obstructed the plaintiff's wharf for the purpose of destroying his business and securing gain to themselves. Compare *Brewer* v. *Drew* (1843), 11 M. & W. 625.

(*l*) *Merest* v. *Harvey* (1814), 5 Taunt. 442, *per* GIBBS, C.J., at p. 442.

(*m*) *Ibid.*; *Bell* v. *Midland Rail Co.*, *supra*; *McArthur & Co.* v. *Cornwall*, [1892] A. C. 75, P. C., at p. 88; *Williams* v. *Currie* (1845), 1 C. B. 841, *per* MAULE, J., at p. 847.

(*n*) *Merest* v. *Harvey*, *supra*; *Bell* v. *Midland Rail. Co.*, *supra*, *per* BYLES, J., at p. 308; *Emblen* v. *Myers*, *supra*, *per* POLLOCK, C.B., at p. 58.

(*o*) *Berry* v. *Da Costa* (1866), L. R. 1 C. P. 331, *per* KEATING, J., at p. 335; compare *Warwick* v. *Foulkes* (1844), 12 M. & W. 507, where a false charge was put on the record, though it was abandoned at the trial; *Wilson* v. *Robinson* (1845), 7 Q. B. 68.

(*p*) *Falvey* v. *Stanford* (1874), L. R. 10 Q. B. 54; *McArthur & Co.* v. *Cornwall*, *supra*; *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. 686; compare *Irving* v. *Greenwood* (1824), 1 C. & P. 350; *Chinn* v. *Morris* (1826), 2 C. & P. 361; *Arden* v. *Goodacre* (1851), 11 C. B. 371; *Bamfield* v. *Massey* (1808), 1 Camp. 460; *Harrison* v. *Rutland* (*Duke*), [1893] 1 Q. B. 142, C. A.

(*q*) *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415, *per* PARKE, J., at p. 425; *Hamlin* v. *Great Northern Rail Co.* (1856), 1 H. & N. 408.

(*r*) *Hiort* v. *London and North Western Rail. Co.* (1879), 4 Ex. D. 188, C. A., *per* BRAMWELL, L.J., at p. 193; *Williams* v. *Peel River Land and Mineral Co.* (1886), 55 L. T. 689, C. A., *per* BOWEN, L.J., at p. 692; *Harrop* v. *Hirst* (1868), L. R. 4 Exch. 43; *Gibbs* v. *Tunaley* (1845), 1 C. B. 640; *Blofield* v. *Payne* (1833), 4 B. & Ad. 410.

(*s*) But where the breach of duty arises out of an illegal transaction no action will lie (*Webster* v. *De Tastet* (1797), 7 Term Rep. 157).

(*t*) *Embrey* v. *Owen* (1851), 6 Exch. 353, *per* PARKE, B., at p. 368; *Medway Co.* v. *Romney* (*Earl*) (1861), 9 C. B. (N. S.) 575. For the cases where no right of action exists unless actual damage be proved, see p. 347, *post*.

(*u*) For the exceptions, see p. 306, *ante*, and p. 323, *post*.

(*a*) *Hiort* v. *London and North Western Rail. Co.*, *supra*, *per* THESIGER, L.J., at

always necessary that actual damage should be proved in order that damages may be awarded. Thus, in actions for breach of contract nominal damages are recoverable although no actual damage can be proved (*b*), and in actions of tort which are founded upon contract and might have been brought in contract the same principle applies (*c*). In actions of tort, where the wrongful act constitutes the assertion of a right, nominal damages are recoverable although there is no actual perceptible damage (*d*). But where actual damage is of the essence of an action, as, for instance, in certain actions of slander, nominal damages cannot be awarded, for the cause of action would then fail (*e*).

Fixed damages.

**568.** In some cases the amount of damages to be recovered in a particular kind of action or in respect of some particular kind of loss is fixed by statute (*f*), and in others the parties themselves by their own contract fix the amount of damages which are to be paid in the event of a breach. In such cases the sum fixed affords the measure of damages, unless it constitutes in law a penalty. Whether it constitutes a penalty or liquidated damages is a question of law to be decided by the court in each case (*g*).

Damages must be assessed once and for all.

**569.** The damages that result from one and the same cause of action must be assessed and recovered once and for all (*h*); and the plaintiff must sue in one action for all his loss, past, present, and future, certain and contingent (*i*). A second action cannot be brought, however great the loss that may be suffered in the future, and however unexpected such loss may be (*k*), since the cause of action has become *res judicata* (*l*). In assessing the damages, however, the jury must take into consideration the steps which have

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p. 198. Compare *Wallis Chlorine Syndicate, Ltd.* v. *American Alkali Co., Ltd.* (1901), 17 T. L. R. 656.

(*b*) *Warre* v. *Calvert* (1837), 7 Ad. & El. 143; *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415, *per* Lord TENTERDEN, C.J., at p. 423; and see p. 305, *ante*.

(*c*) *Marzetti* v. *Williams*, *supra*, at p. 424; *Johnson* v. *Stear* (1863), 15 C. B. (N. S.) 330.

(*d*) *Embrey* v. *Owen* (1851), 6 Exch. 353; *Harrop* v. *Hirst* (1868), L. R. 4 Exch. 43; *Medway Co.* v. *Romney* (*Earl*) (1861), 9 C. B. (N. S.) 575; and see p. 305, *ante*.

(*e*) See title LIBEL AND SLANDER.

(*f*) See p. 305, *ante*.

(*g*) See p. 328, *post*.

(*h*) *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127, *per* Lord HALSBURY, at p. 133; *Gibbs* v. *Cruikshank* (1873), L. R. 8 C. P. 454, *per* BOVILL, C.J., at p. 460; *Sanders* v. *Hamilton* (1907), 96 L. T. 679; *Furness, Withy & Co., Ltd.* v. *Hall* (*J. & E.*), *Ltd.* (1909), 25 T. L. R. 233.

(*i*) *Darley Main Colliery Co.* v. *Mitchell*, *supra*, *per* Lord HALSBURY, at pp. 132—133.

(*k*) *Ibid.*, *per* Lord BRAMWELL, at p. 144; and compare *Fetter* v. *Beale* (1701), 1 Salk. 11. A compromise of a claim for damages may be made subject to the right to sue thereafter if the damages turn out greater than was anticipated (*Lee* v. *Lancashire and Yorkshire Rail. Co.* (1871), 6 Ch. App. 527).

(*l*) *Brunsden* v. *Humphrey* (1884), 14 Q. B. D. 141, C. A., approved in *Darley Main Colliery Co.* v. *Mitchell*, *supra*, *per* Lord BLACKBURN, at p. 139; *Macdougall* v. *Knight* (1890), 25 Q. B. D. 1, C. A., *per* Lord ESHER, M.R., at p. 8; compare *Gibbs* v. *Cruikshank*, *supra*.

SECT. 1. General Principles.

been taken by the plaintiff, or which ought to have been taken by him as a prudent man, to diminish his loss (*a*).

Continuing damages.

**570.** A cause of action in respect of which a plaintiff is entitled to have the prospective damages assessed must be distinguished from a continuing cause of action, that is to say, a cause of action which arises from the repetition or continuance of acts or omissions of the same kind as that for which the action has been brought (*b*). Similarly, where the damage consequent on an act or omission rather than the act or omission itself is actionable (*c*), then, as the action is only maintainable in respect of the damage, or is not maintainable until the damage is sustained, an action will lie every time damage accrues from the act (*d*). In this case, prospective damages are not recoverable; for the cause of action is not the act, but the damage arising therefrom (*e*).

Where damages are to be assessed in respect of a continuing cause of action, it has been expressly provided (*f*) that they are to be assessed down to the date of the assessment. If it were not for this provision they would only be assessable down to the date of the issue of the writ (*g*).

## SECT. 2.—*Directness and Remoteness.*

### SUB-SECT. 1—*In General.*

Rule as to assessing damages.

**571.** When damages are not merely nominal, and are not fixed by statute, or by the agreement of the parties, but are to be assessed by the court or jury, the cardinal principle is that only such damages are recoverable as arise naturally from the act complained of, and this rule applies both in contract and in tort (*h*).

In applying this principle to particular kinds of actions, rules have been formulated for determining what in each case is the damage which will be regarded as flowing naturally from the act

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(*a*) *Harries* v. *Edmonds* (1845), 1 Car. & Kir. 686, *per* PARKE, B.; *Frost* v. *Knight* (1872), L. R. 7 Exch. 111, Ex. Ch., *per* COCKBURN, C.J., at p. 115; *Brown* v. *Muller* (1872), L. R. 7 Exch. 319, *per* KELLY, C.B., at p. 322; *Cherry* v. *Thompson* (1872), L. R. 7 Q. B. 573; *Roper* v. *Johnson* (1873), L. R. 8 C. P. 167, *per* BRETT, J., at p. 181; *Wilson* v. *Hicks* (1857), 26 L. J. (EX.) 242; compare *Bank of China, Japan and the Straits* v. *American Trading Co.*, [1894] A. C. 266, 274, P. C.; *Michael* v. *Hart & Co.*, [1902] 1 K. B. 482, C. A.

(*b*) *Hole* v. *Chard Union*, [1894] 1 Ch. 293, C. A., *per* LINDLEY, L.J., at p. 295; compare *ibid.*, *per* A. L. SMITH, L.J., at p. 296; see also *Baker* v. *Bache* (1725), 2 Ld. Raym. 1382; *Holmes* v. *Wilson* (1839), 10 Ad. & El. 503; *Battishill* v. *Reed* (1856), 18 C. B. 696; *Coward* v. *Gregory* (1866), L. R. 2 C. P. 153; *Crumbie* v. *Wallsend Local Board*, [1891] 1 Q. B. 503, C. A.

(*c*) See p. 304, *ante*.

(*d*) *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127, *per* Lord BRAMWELL, at p. 145; *Backhouse* v. *Bonomi* (1861), 9 H. L. Cas. 503; compare *Thompson* v. *Gibson* (1841), 7 M. & W. 456; *Shadwell* v. *Hutchinson* (1830), 4 C. & P. 333; *Crumbie* v. *Wallsend Local Board*, *supra*.

(*e*) *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe and Hampson, Ltd.*, [1908] A. C. 27. This principle prevents the depreciation in the market value of the property being taken into consideration in the assessment of damages due to subsidence caused by working minerals thereunder.

(*f*) R. S. C., Ord. 36, r. 58; *Hole* v. *Chard Union*, *supra*.

(*g*) *Fetter* v. *Beale* (1701), 1 Salk. 11.

(*h*) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; *The Argentino* (1888), 13 P. D. 191, C. A., *per* Lord ESHER, M.R., at p. 197.

complained of. These rules are described as the measure of damages (*i*) in the actions to which they relate. They are, however, more properly rules for the computation of the loss commonly arising in such actions, but they do not exclude damages in respect of any other kind of loss which may naturally arise from the act complained of, or damages resulting from special circumstances within the contemplation of the parties (*k*).

Proximate consequence.

**572.** Damages in order to be recoverable must be the immediate or proximate consequence of the act complained of. If they are not the immediate or proximate consequence of such act, they are termed too remote, and are not recoverable (*l*).

Contemplation of parties.

If special circumstances exist, so that the damages which result from the act complained of are greater than would result from it in the absence of these special circumstances, such damages nevertheless arise naturally within the meaning of the rule if they are such as are in fact, or as may reasonably be supposed to have been, in the contemplation of the parties (*m*). In actions of contract it is necessary, in order that such damages may reasonably be supposed to have been within the contemplation of the parties, that the special circumstances should have been brought to the knowledge of the defendant at the time of the making of the contract, and that they should have been so brought to his knowledge as to lead to the reasonable inference that he accepted the contract with special conditions attached to it (*n*). In actions of tort the rule as to notice is inapplicable (*o*).

Reduction of damages.

**573.** The rule that such damages only are recoverable as those which arise naturally from the act complained of is to be regarded as establishing a maximum. Where damages are capable of computation in money, and the damage actually suffered is less than such as might have naturally arisen from the act complained of, only such damages as have actually accrued can be awarded (*p*).

It is the duty of the plaintiff to minimise his loss, and if he might reasonably have averted any part of the damage he has suffered, to that extent the damage is not such as arises naturally from the act complained of within the meaning of the rule (*q*).

In awarding damages, all injury which has accrued up to the date of trial, and all probable future loss arising from the wrongful act, must be taken into account, but where damage which accrues after the commencement of the action constitutes in itself a new cause of action, damages in respect thereof cannot be awarded (*r*).

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(*i*) See pp. 331 *et seq.*, *post*.

(*k*) See pp. 313, 317, *post*.

(*l*) See p. 318, *post*. As to bankruptcy following on a loss being too remote, see *Hodgson* v. *Sidney* (1866), L. R. 1 Exch. 313; *Morgan* v. *Steble* (1872), L. R. 7 Q. B. 611.

(*m*) See pp. 313, 317, *post*.

(*n*) See cases cited in note (*i*), p. 316, *post*.

(*o*) See p. 317, *post*, and title NEGLIGENCE.

(*p*) *Wigsell* v. *School for Indigent Blind* (1882), 8 Q. B. D. 357. For examples, see *Valpy* v. *Oakley* (1851), 16 Q. B. 941; *Griffiths* v. *Perry* (1859), 1 E. & E. 680.

(*q*) *Irving* v. *Greenwood* (1824), 1 C. & P. 350; compare *Le Blanche* v. *London and North Western Rail. Co.* (1876), 1 C. P. D. 286, C. A.; and see p. 310, *ante*.

(*r*) See p. 310, *ante*.

SECT. 2. Directness and Remoteness.

Supervening act of plaintiff.

**574.** Where loss has been occasioned or expense incurred by some act of the plaintiff supervening on the act complained of, damage in respect of such loss or expense is not too remote if the act of the plaintiff was reasonable in all the circumstances (*s*). One test of such reasonableness is whether a prudent man would have acted in the same way if the original wrongful act had arisen through his own default (*t*).

If by the wrongful act of the defendant the plaintiff is placed in such circumstances that he must adopt a "perilous alternative," the defendant is responsible for damages ensuing from the course which the plaintiff adopts (*u*).

Intervention of third person.

**575.** Where an injury has resulted partly from the original wrongful act of the defendant (*x*) and partly from the intervening act of a third person, and such third person is not the servant or agent of the injured party, the defendant is not exonerated, and the injured party may have an action against the intervening wrongdoer as well as against the original wrongdoer (*a*).

Where the act of the intervening wrongdoer is such as could not naturally be expected to result from the original wrongful act, damages arising from the intervening act cannot be recovered in an action against the original wrongdoer (*b*). Thus, where a slander is uttered by the defendant, and repeated voluntarily by a person who was not authorised by the defendant to repeat it (*c*), or who had no duty to repeat it (*d*), the defendant is not responsible in damages for such repetition (*e*).

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(*s*) *Borries* v. *Hutchinson* (1865), 18 C. B. (N. S.) 445; *Hinde* v. *Liddell* (1875), L. R. 10 Q. B. 265, *per* COCKBURN, C.J., at p. 268; *Hamlin* v. *Great Northern Rail. Co.* (1856), 1 H. & N. 408.

(*t*) *Le Blanche* v. *London and North Western Rail. Co.* (1876), 1 C. P. D. 286, where the defendants had undertaken to endeavour to secure punctuality in the running of their passenger trains, and a train was delayed, and a passenger in order to arrive at his destination in time hired a special train, and the question was whether he could recover damages in respect of the cost of such hiring.

(*u*) *Jones* v. *Boyce* (1816), 1 Stark. 493, where an accident occurred to a coach, and a passenger, in order as he thought to escape from the greater danger, jumped down and broke his leg, and it was held that damage for this injury was not too remote.

(*x*) As to the necessity of there being a default on the part of the defendant, see *Engelhardt* v. *Farrant & Co.*, [1897] 1 Q. B. 240, C. A., approved in *McDowall* v. *Great Western Rail.*, [1903] 2 K. B. 331, C. A.

(*a*) *Mills* v. *Armstrong, The Bernina* (1888), 13 App. Cas. 1; *De la Bere* v. *Pearson, Ltd.*, [1908] 1 K. B. 280, C. A.; *Baker* v. *Snell*, [1908] 2 K. B. 825, C. A.; *Cooke* v. *Midland Great Western Rail. of Ireland*, [1909] A. C. 229; see, further, pp. 319 *et seq.*, *post*.

(*b*) *Vicars* v. *Wilcocks* (1806), 2 Smith, L. C., 11th ed. 521, 18 East, 1; *Lumley* v. *Gye* (1853), 2 E. & B. 216; *Bowen* v. *Hall* (1881), 6 Q. B. D. 333, C. A.; *Temperton* v. *Russell*, [1893] 1 Q. B. 715, C. A.; *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q. B. 147, C. A.; *Speake* v. *Hughes*, [1904] 1 K. B. 138, C. A.

(*c*) *Adams* v. *Lelly* (1824), Ry. & M. 157; *Parkes* v. *Prescott* (1869), L. R. 4 Exch. 169, Ex. Ch.; compare *Whitney* v. *Moignard* (1890), 24 Q. B. D. 630.

(*d*) *Derry* v. *Handley* (1861), 16 L. T. 263; *Speight* v. *Gosnay* (1891), 60 L. J. (Q. B.) 231, C. A.; *Munster* v. *Lamb* (1883), 11 Q. B. D. 588, C. A.; see *contra* *Kendillon* v. *Maltby* (1842), 1 Car. & M. 403.

(*e*) *Ward* v. *Weeks* (1830), 7 Bing. 211; *Bree* v. *Marescaux* (1881), 7 Q. B. D. 434, C. A.; and see title LIBEL AND SLANDER.

**576.** Where a false and fraudulent representation is made to a third person with the intention that it should be acted on by the plaintiff, or knowing that it will be so acted on, and the plaintiff receives injury by acting on it, such injury is not too remote (*f*).

Negligence.

**577.** Where a breach of contract occasions injury to a third person who is a stranger to the contract, such third person may nevertheless recover damages in respect of the injury, if, apart from the contract or co-existing with it, there was a duty on the person breaking the contract to avoid inflicting such injury (*g*).

SUB-SECT. 2.—*In Contract.*

Damages for breach of contract.

**578.** Upon a breach of contract such damages are to be awarded as may reasonably be supposed to have been in the contemplation of both parties when they made the contract as the probable result of the breach of it (*h*). Therefore where there are special circumstances, and these circumstances are communicated at the time of the contract to the party from whom it is afterwards sought to recover damages, and accepted by him as the basis on which the contract is made, the damages reasonably contemplated are such as would ordinarily follow from a breach of contract in these special circumstances (*i*). If the special circumstances were unknown to the party breaking the contract, he can only be taken to contemplate the amount of injury which would arise generally from the breach in cases not affected by special circumstances (*k*).

It is not enough that the party whom it is subsequently sought

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(*f*) *Levy* v. *Langridge* (1838), 4 M. & W. 337, Ex. Ch.; *Longmeid* v. *Holliday* (1851), 6 Exch. 761, 766; *Barry* v. *Croskey* (1861), 2 John. & H. 1; *Bedford* v. *Bayshaw* (1859), 4 H. & N. 538; *Bagshaw* v. *Seymour* (1858), 29 L. J. (EX.) 62, n. H. L.; *Gerhard* v. *Bates* (1853), 2 E. & B. 476; *Clarke* v. *Dickson* (1859), 6 C. B. (N. S.) 453; *National Exchange Co. of Glasgow* v. *Drew* (1855), 2 Macq. 103, H. L.; *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377, 410; and see title MISREPRESENTATION AND FRAUD. The question whether a fraudulent prospectus was intended only to influence persons to apply for an allotment of shares is one of fact. A prospectus may be intended to induce the public to purchase shares in the market (*Andrews* v. *Mockford*, [1896] 1 Q. B. 372, C. A.).

(*g*) See *Marshall* v. *York, Newcastle and Berwick Rail. Co.* (1851), 11 C. B. 655; *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219, C. A.; *Parry* v. *Smith* (1879), 4 C. P. D. 325; *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, C. A.; and title NEGLIGENCE.

(*h*) *Hadley* v. *Baxendale* (1854), 9 Exch. 341.

(*i*) *Ibid.* This is what is commonly described as the second branch of the rule laid down in the case of *Hadley* v. *Baxendale*, for a full discussion of which see *Hammond & Co.* v. *Bussey* (1887), 20 Q. B. D. 79, C. A., *per* Lord ESHER, M.R., at p. 88.

(*k*) *Hadley* v. *Baxendale*, *supra*, where the shaft of a mill was broken and was delivered to a carrier to be taken to a manufacturer to serve as a model for a new shaft. Until the new shaft was made the mill was necessarily kept idle, but of this the carrier was not aware; the carrier did not deliver the shaft within a reasonable time; and in these circumstances it was held that the mill owner could not recover in respect of loss of profits during the period of delay. See also *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q. B. D. 670, C. A.; *Horne* v. *Midland Rail. Co.* (1873), L. R. 8 C. P. 131, Ex. Ch.; *Gee* v. *Lancashire and Yorkshire Rail. Co.* (1860), 6 H. & N. 211.; *Bostock & Co., Ltd.* v. *Nicholson & Sons, Ltd.*, [1904] 1 K. B. 725.

SECT. 2. Directness and Remoteness.

to make liable should be informed that a breach will result in particular loss; he must be informed of the special circumstances in which the loss will be incurred, and must enter into the contract subject to them (*l*). The information must be given at the time of entering into the contract. Information given at a later date, whether of circumstances which were contemplated by the party giving such information at the date of the contract (*m*) or of circumstances which arose at a later date, will not suffice (*n*).

Goods of particular character.

**579.** Where a contract is made with a known reference to goods of a particular character, or articles the use or purpose of which is obvious or in respect of which, it may be, a warranty of fitness is implied, the damage within the contemplation of the parties is that which naturally arises in the ordinary course from the breach of contract in respect of such goods, having regard to such character, use, or purpose, or from the breach of such an implied term of the contract.

Thus, when goods are obviously of a marketable kind damages may be recovered from a carrier for delay in delivering them, in respect of the difference between the market value of the goods on the day on which they ought to have been brought to market and on the day when they were actually brought, although no notice was given to the carrier that the goods were intended for market (*o*).

When notice necessary.

**580.** Where the contract is not made with known reference to goods of a particular kind, or where the use or purpose of the goods is not obvious, as, for instance, where goods delivered to a carrier are packed in cases and their nature is not apparent, notice in the manner and to the extent above stated becomes necessary in order to recover special damages dependent on the character, use or purpose of the goods (*p*). Thus, where goods which are intended for use as samples are delivered to a carrier without notice that they are samples and delivery is delayed, the carrier is not liable for damages in respect of such intended use (*q*). If he had such notice,

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(*l*) *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L. R. 3 C. P. 499, *per* WILLES, J., at p. 509; *Horne* v. *Midland Rail. Co.* (1873), 1 L. R. 8 C. P. 131, Ex. Ch., *per* BLACKBURN, J.: "In order that the notice may have any effect it must be given under such circumstances as that an actual contract arises on the part of the defendant to bear the exceptional loss."

(*m*) *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q. B. D. 670, C. A., *per* BRETT, J., at p. 676; *Smeed* v. *Foord* (1859), 1 E. & E. 602, *per* Lord CAMPBELL, C.J., at p. 608; *Portman* v. *Middleton* (1858), 4 C. B. (N. S.) 322.

(*n*) *Williams* v. *Reynolds* (1865), 6 B. & S. 495.

(*o*) *Collard* v. *South Eastern Rail. Co.* (1861), 7 H. & N. 79.

(*p*) *Hales* v. *London and North Western Rail. Co.* (1863), 4 B. & S. 66, where goods intended for use in a procession of Foresters, which the plaintiff had entered into a contract to provide for that purpose, were sent by a carrier, and there was no notice of this contract and nothing to show the nature of the goods, and it was held that the loss of profit upon the hiring of the goods could not be recovered, but damages were awarded for expenses reasonably incurred in searching for the goods.

(*q*) *Great Western Rail. Co.* v. *Redmayne* (1866), L. R. 1 C. P. 329; *Woodger* v. *Great Western Rail. Co.* (1867), L. R. 2 C. P. 318; *Candy* v. *Midland Rail. Co.* (1878), 38 L. T. 226, where it was held that the label "Traveller's goods; deliver immediately," did not constitute notice sufficient to make the carrier responsible for the traveller's loss of time.

he may be liable in respect of the value to the plaintiff of the samples at the time when they should have been delivered (*r*).

Sub-contract.

**581.** If a buyer or consignee has at the date of the contract entered into a sub-contract, its terms, so far as they affect the principal contract, are special circumstances of which notice must be given in order that damages may be recovered in respect thereof (*s*). In order to fix the seller or carrier who has delayed or refused delivery with liability for damages incurred by the buyer or consignee by reason of his inability to fulfil the subsidiary contract, it is not enough that it is made known that the goods are intended for re-sale (*a*). Neither, on the other hand, is it necessary that the terms of the sub-contract should be completely disclosed. Liability is incurred in respect of so much of the terms of the sub-contract as is communicated (*b*).

Where no notice of sub-sale has been given to the seller, if delivery is delayed and there is no market, the price of the goods on the sub-sale may be proved as affording evidence of the value of the goods at the time when they ought to have been delivered (*c*).

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(*r*) *Schulze* v. *Great Eastern Rail. Co.* (1887), 19 Q. B. D. 30, where damages for loss of season were held recoverable.

(*s*) *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q. B. D. 670, C. A., where the defendant contracted with the plaintiff to make certain machinery "as soon as possible," and was informed at the time of the contract that such machinery was part of an order which the plaintiff had contracted to execute for a third party within two months, and the defendant, who did not perform the contract within a reasonable time, was held liable for damages, including the plaintiff's loss of profit on the contract with such third party; *Portman* v. *Middleton* (1858), 4 C. B. (N. S.) 322, where there was no notice of plaintiff's contract with a third party until after breach; *Great Western Rail. Co.* v. *Redmayne* (1866), L. R. 1 C. P. 329; *Skinner* v. *City of London Marine Insurance Corporation* (1885), 14 Q. B. D. 882, C. A.; *Sanders* v. *Stuart* (1876), 1 C. P. D. 326. As to the extent of the original seller's liability for breach of warranty in case of a sub-sale subject to a similar warranty, see *Randall* v. *Raper* (1858), E. B. & E. 84.

(*a*) *Thol* v. *Henderson* (1881), 8 Q. B. D. 457; compare *Hammond & Co.* v. *Bussey* (1887), 20 Q. B. D. 79, C. A., where the defendant sold coal to the plaintiff with an implied warranty that it was steam coal, knowing that the plaintiff would re-sell it in the ordinary course of his business to owners of steamers, and therefore knowing that he would sell it with a like implied warranty, and the defendant was held liable for damages incurred by the plaintiff through such re-sales. In cases of express or implied warranty of goods, at any rate of goods which are ordinarily purchased for the purpose of resale, it is the natural and ordinary course for the vendee to resell with the same warranty, and the damages incurred by his doing so are the natural and probable result of the breach of the original warranty. In this case, therefore, the question of notice of the terms of a sub-contract was apparently not material; see p. 314, *ante*.

(*b*) *Prior* v. *Wilson* (1860), 1 L. T. 549; *Borries* v. *Hutchinson* (1865), 18 C. B. (N. S.) 445, where the defendant knew that the plaintiff was buying to resell to a Continental purchaser but did not know where the purchaser resided or the date agreed for delivery to him, and it was held that, there being no market, the defendant was liable for the loss of profit on resale and for additional freight occasioned by the lateness of the season when the goods were delivered, but not for damages which the plaintiff had been compelled to pay to the sub-purchaser for non-delivery; *Elbinger Actien-Gesellschafft* v. *Armstrong* (1874), L. R. 9 Q. B. 473; *Grêbert-Borgnis* v. *Nugent* (1885), 15 Q. B. D. 85, C. A., *per* BRETT, M.R., at p. 90.

(*c*) *Stroud* v. *Austin & Co.* (1883), Cab. & E. 119; *France* v. *Gaudet* (1871), L. R. 6 Q. B. 199, where the action was for conversion, but the same principle was held to apply.

SECT. 2. Directness and Remoteness.

Unusual advantage.

**582.** The fact that any peculiar or unusual advantage depends upon the due execution of a contract, or that some peculiar and unusual loss will follow from its breach, constitutes a special circumstance of which notice must be given in order that damages may be recovered in respect thereof. Thus, if the character of goods shipped is such that the loss of a particular part will render the whole valueless, this is a circumstance which must be communicated to the shipowner in order to render him liable, if that particular part is lost, in respect of damages beyond the cost of replacing it (*d*); and if damage out of the ordinary course will arise from the failure duly to deliver machinery (*e*), or goods (*f*), or telegraphic messages (*g*), or from the failure to register shares (*h*), such exceptional damage cannot be recovered in the absence of notice of the special circumstances from which it was likely to arise. What constitutes sufficient notice of exceptional circumstances must depend on the facts of each individual case (*i*).

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(*d*) *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L. R. 3 C. P. 499.

(*e*) *Smeed* v. *Foord* (1859), 1 E. & E. 602; *Hadley* v. *Baxendale* (1854), 9 Exch. 341; *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q. B. D. 670, C. A.

(*f*) *Great Western Rail. Co.* v. *Redmayne* (1866), L. R. 1 C. P. 329; *Hawes & Son* v. *South Eastern Rail. Co.* (1884), 54 L. J. (Q. B.) 174; *Candy* v. *Midland Rail. Co.* (1878), 38 L. T. 226.

(*g*) *Sanders* v. *Stuart* (1876), 1 C. P. D. 326.

(*h*) *Skinner* v. *City of London Marine Insurance Corporation* (1885), 14 Q. B. D. 882, C. A.

(*i*) The fact that goods are addressed to the show ground at a place where a show is being held is sufficient notice that the goods are intended for exhibition, and renders a carrier who delays delivery of them liable to damages in respect of loss of profits and expenses incurred by reason of the goods being too late for the show (*Jameson* v. *Midland Rail. Co.* (1884), 50 L. T. 426; *Simpson* v. *London and North Western Rail. Co.* (1876), 1 Q. B. D. 274; and see *Schulze* v. *Great Eastern Rail. Co.* (1887), 19 Q. B D. 30; and compare *Candy* v. *Midland Rail. Co.*, *supra*). Where the plaintiff hired the defendant's ship to carry coals to Africa, informing the defendant at the time that Admiralty contracts were out for sending coal to Africa, and also informing him that bills of lading were to be delivered by December 31, this was held to be sufficient notice of the plaintiff's contract with the Admiralty to enable the plaintiff to recover against the defendant, who failed to carry out his contract, the expenses incurred by the plaintiff in consequence of his failure to carry out his contract with the Admiralty (*Prior* v. *Wilson* (1860), 1 L. T. 549; and see *Dunn* v. *Bucknall Brothers*, [1902] 2 K. B. 614, C. A.). In *Marcus* v. *Myers* (1895), 11 T. L. R. 327, the plaintiff's business was of a peculiar character and depended almost wholly for its success upon advertisements in the defendant's newspaper, which was the special journal of persons who would be likely to deal with the plaintiff. The defendant in breach of contract discontinued the plaintiff's advertisement, and this was followed by a falling off in the plaintiff's business. The defendant knew the object of the advertisement, and it was held that he must be taken to have known that the natural and probable result of his breach of contract would be a loss of business to the plaintiff, and damages in respect of such loss were awarded. And see *De Mattos* v. *Great Eastern Steamship Co.* (1885), Cab. & El. 489, where a chattel, valueless if used for a purpose for which chattels of the same class are ordinarily used, was intended for a specific purpose which was unknown to the seller at the date of sale, and it was nevertheless held that upon breach of contract by the seller the buyer might recover damages based on the specific purpose for which it was intended. In this case, STEPHEN, J., declined to lay down any definite principle, and the decision is somewhat anomalous. The chattel in question was the Great Eastern steamship, as to which it was well known that it had become useless for the ordinary purposes of a steamship; it may therefore be taken to have been within the

Special purpose.

**583.** Where a buyer intends a chattel of an unusual kind for a special purpose which is not communicated to the seller, and the seller reasonably supposes that it is intended for another purpose for which it is also fitted, the damages to which the seller is liable in case of non-delivery are such as would have been incurred by the buyer if the seller's supposition had been correct, assuming that the buyer has sustained loss at least to that amount (*k*).

SUB-SECT. 3.—*In Tort.*

Damages in tort.

**584.** The rule with regard to special circumstances is somewhat different in cases of tort from that in cases of contract (*l*). In cases of tort which are not founded upon contract the defendant's knowledge must be estimated at the time of the wrongful act. And the inquiry is not only whether he knew of any special circumstances attaching at that time, but also whether he had reasonable means of knowing them (*m*), and whether the damage which ensued was such as he could fairly be expected to anticipate as likely to result from his act (*n*).

The fact that the plaintiff has entered into a contract for the employment of a chattel, which the tortious act of the defendant with regard to that chattel will prevent him from carrying out, is a special circumstance which must be within the knowledge or means of knowledge of the defendant in order to make him responsible for the plaintiff's loss of profit by his inability to carry out such contract (*o*). But proof of such contract may be given as evidence

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contemplation of the seller that the vessel must have been purchased for some such exceptional purpose as that which was in fact intended, that is, as a floating coal store.

(*k*) *Cory* v. *Thames Ironworks* (1868), L. R. 3 Q. B. 181.

(*l*) In *The Argentino* (1888), 13 P. D. 191, C. A., BOWEN, L.J., at p. 201, says that the second head of the rule laid down in *Hadley* v. *Baxendale* (1854), 9 Exch. 341, applies only to breach of contract. See also *Cobb* v. *Great Western Rail. Co.*, [1893] 1 Q. B. 459, C. A., *per* BOWEN, L.J., at p. 464.

(*m*) "One who commits a wrongful act is responsible for the ordinary consequences which are likely to occur: but generally speaking he is not liable for damage which is not the natural or ordinary consequence, unless it is shown that he knows or has reasonable means of knowing that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to cause damage" (*Sharp* v. *Powell* (1872), L. R. 7 C. P. 253, *per* BOVILL, C.J., at p. 258). In this case a van was washed in the defendant's yard in frosty weather; the water in the ordinary way should have flowed away through a grating into a drain. The grating was, however, obstructed by reason of the frost, and in consequence of this the water used in washing the van could not run away, but remained standing in the yard and became frozen. A horse lawfully in the yard slipped on the ice so formed and broke his leg. The defendant was not aware of the obstruction of the grating, and it was therefore held that the injury to the horse was not such a consequence as he could have reasonably been expected to anticipate from the washing of the van. Compare *Rigby* v. *Hewitt* (1850), 5 Exch. 240, *per* POLLOCK, C.B., at p. 243; *Greenland* v. *Chaplin* (1850), 5 Exch. 243, *per* POLLOCK, C.B., at p. 248; *Clark* v. *Chambers* (1878), 3 Q. B. D. 327; *McDowall* v. *Great Western Rail.*, [1903] 2 K. B. 331, C. A.

(*n*) *Ibid.*; *Crouch* v. *Great Northern Rail. Co.* (1856), 11 Exch. 742; *Burton* v. *Pinkerton* (1867), L. R. 2 Exch. 340; *Cator* v. *Great Western Insurance Co. of New York* (1873), L. R. 8 C. P. 552; *Nicosia* v. *Vallone* (1877), 37 L. T. 106, P. C.

(*o*) This would seem to have been conceded in *The Argentino* (1888), 13 P. D.

SECT. 2. Directness and Remoteness.

of what a chattel of the description of the injured chattel might ordinarily and fairly be expected to earn (*p*).

Conversion.

**585.** The exceptional value of goods is not a special circumstance of which it is necessary that a person who converts goods to his own use should have notice in order that he may be liable for the additional damage occasioned owing to that exceptional value (*q*). But where special damage has been suffered, apart from the actual present value of the goods, the defendant must have some notice of the inconvenience likely to be occasioned (*r*).

SUB-SECT. 4.—*Remoteness and Intervening Cause.*

Remoteness of damage.

**586.** In order that they may be recoverable, damages must be such as arise not only naturally, but also immediately from the act complained of (*s*).

Damages are commonly described as too remote (1) where they are not the natural and probable result of the act complained of in any circumstances; (2) where they are only the natural and probable result of the act complained of in special circumstances,

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191, C. A., affirmed (1889) 14 App. Cas. 519, where the plaintiff claimed in respect of damages consequent on a collision, *inter alia*, the profit which but for the collision he would have derived under a contract previously entered into, and which he was, in consequence of the collision, unable to fulfil, and the court were agreed that the expected profit upon such contract could not as such be recovered. See next note; compare *The Mediana*, [1900] A. C. 113.

(*p*) *The Argentino* (1888), 13 P. D. 191, C. A., (1889), 14 App. Cas. 519, where the damages recoverable were ordered to be assessed at "such sum as would represent what a vessel of the description of the injured vessel might ordinarily and fairly be expected to earn, having regard to the fact that a contract had been entered into for her profitable employment." This appears to mean what is stated in the text, and accords with the principle which has been adopted in cases where a seller fails to deliver a chattel and there is no market; see *Stroud* v. *Austin & Co.* (1883), Cab. & El. 119; *The Bodlewell*, [1907] P. 286; and p. 315, *ante*.

(*q*) *France* v. *Gaudet* (1871), L. R. 6 Q. B. 199, where the defendant converted champagne of a special kind which could not be procured in the market, and it was held that the plaintiff could recover the price for which he had contracted to resell the champagne although the defendant had no notice of the contract.

(*r*) *Bodley* v. *Reynolds* (1846), 8 Q. B. 779, where the defendant converted the plaintiff's tools, and special damage was claimed and awarded in respect of the plaintiff being prevented from working at his trade. As to this case see *France* v. *Gaudet*, *supra*, at p. 205: "In *Bodley* v. *Reynolds* we think that there must have been evidence of knowledge on the part of the defendant." See also *Davis* v. *Oswell* (1837), 7 C. & P. 804; and p. 317, *ante*.

(*s*) In *Hadley* v. *Baxendale* (1854), 9 Exch. 341, it was no doubt intended to lay down a complete definition of the principle upon which damages should be assessed, at any rate in actions of contract; but the definition given only requires that damages awarded should be such as arise "naturally" from the acts complained of, and the word "immediately" is not added. From this it may be inferred that the word "naturally" was intended to be understood as connoting the idea of proximate causality. And, indeed, it may well be contended that a result does not arise naturally unless it arises without the co-operation of some intervening cause. In citing the language of the court in *Hadley* v. *Baxendale* judges have, however, generally thought it necessary to introduce the word "immediately" (see for example *The Argentino* (1889), 14 App. Cas. 519, *per* Lord HERSCHELL, L.C., at p. 520); and it is no doubt convenient to distinguish between cases in which the chain of natural causation is broken by the intervention of some independent volition and cases in which the ultimate result of a wrongful act is other than the natural result for some other reason.

which were not known to or are not such as ought reasonably to have been apprehended by the defendant; or (3) where they are not the proximate or immediate result of the act complained of, but of some intervening cause. It appears to be only in this third case that damages are properly described as too remote.

In cases of tort, however, where damage is not the immediate result of the act complained of, but of some intervening cause, such damage is perhaps always irrecoverable also upon the ground that it arises from a cause or circumstance of which the defendant had no knowledge or reasonable means of knowledge, and which he had no reasonable ground to anticipate (*t*).

Intervention.

**587.** In determining whether damages are too remote it is necessary to consider whether the original cause so far continued to operate that it was the proximate cause of the essential damage (*u*). The operation of the original cause ceases, and the chain of causation is broken, by the intervention of independent volition (*a*). And a wrongdoer is not responsible for the unreasonable conduct of third persons, even though such conduct is consequent upon the original wrongdoing (*b*).

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(*t*) See p. 317, *ante*.

(*u*) *The Gertor* (1894), 70 L. T. 703; *Ellis* v. *Loftus Iron Co.* (1874), L. R. 10 C. P. 10; *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561; *Bell* v. *Great Northern Rail. Co.* (1890), 26 L. R. Ir. 428; *Sneesby* v. *Lancashire and Yorkshire Rail. Co.* (1875), 1 Q. B. D. 42, C. A.; *Clark* v. *Chambers* (1878), 3 Q. B. D. 327; *The City of Lincoln* (1889), 15 P. D. 15, C. A.; *Hartley* v. *Rochdale Corporation*, [1908] 2 K. B. 594.

(*a*) *Scholes* v. *North London Rail. Co.* (1870), 21 L. T. 835, where owing to the negligence of the defendants a railway engine fell into the plaintiff's garden, and it was held that the defendants were liable for the damage done to the garden by the engine, but not for that occasioned by persons who gathered in large numbers in the garden to see the engine, for such persons were independent trespassers; *Cobb* v. *Great Western Rail. Co.*, [1894] A. C. 419, where the defendants negligently permitted overcrowding in their train, and in consequence of such overcrowding the plaintiff was robbed, and damages for the robbery were held to be too remote; *McDowall* v. *Great Western Rail.*, [1903] 2 K. B. 331, C. A. And see *Pounder* v. *North Eastern Rail. Co.*, [1892] 1 Q. B. 385; *Glover* v. *London and South Western Rail. Co.* (1867), L. R. 3 Q. B. 25; *Engleheart* v. *Farrant & Co.*, [1897] 1 Q. B. 240, C. A.

(*b*) *Ashley* v. *Harrison* (1793), 1 Esp. 48, where the defendant libelled a singer, in consequence whereof the latter refused to sing at the plaintiff's concert; *Kelly* v. *Partington* (1833), 5 B. & Ad. 645, where in consequence of a libel by the defendant imputing dishonesty to the plaintiff, a third person refused to employ the plaintiff; *Lynch* v. *Knight* (1861), 9 H. L. Cas. 577, where the defendant slandered the plaintiff, who was a married woman, by imputing to her unchastity before marriage, and in consequence of the slander the plaintiff's husband refused to live with her. In each of these cases the conduct of the third person causing damage was held as a fact to be unreasonable and therefore not to result naturally from the wrongful act of the defendant; but where the act of the third person to whom a libellous charge is uttered acts reasonably and thereby causes injury to the plaintiff, the damage so caused is not too remote. See *Knight* v. *Gibbs* (1834), 1 Ad. & El. 43, where the defendant, who was the landlord of the person with whom the plaintiff lodged and by whom she was employed, slandered the plaintiff to such person, and the latter, not believing the slander but to avoid displeasing the landlord, dismissed the plaintiff, and it was held that damages for such dismissal were not too remote. See also *Michael* v. *Spiers and Pond, Ltd.* (1909), 25 T. L. R. 740; and title LIBEL AND SLANDER.

SECT. 2. Directness and Remoteness.

What is independent volition.

**588.** Volition is not to be regarded as independent where it is due to terror (*c*) or to an overmastering impulse engendered by the wrongful act of the defendant (*d*). The action of animals following their natural instincts or propensities is not to be regarded as arising from independent volition so as to interrupt the chain of causality, and where such action on the part of an animal ensuing upon the original wrongful act of the defendant has led to injury, either to the animal itself (*e*) or to some other animal (*f*), or to the property (*g*)

(*c*) *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57; *Dulieu* v. *White*, [1901] 2 K. B. 659.

(*d*) *Scott* v. *Shepherd* (1773), 2 Wm. Bl. 892; 1 Smith, L. C., 11th ed., 454, where the defendant threw a squib into a crowd, and everyone in turn whom it was about to strike warded it off in self-defence, and the last person who warded it off himself unknowingly caused it to strike the plaintiff, whom it injured; and it was held that the injury to the plaintiff was not too remote.

(*e*) *Holbach* v. *Warner* (1623), Cro. Jac. 665, where through defendant's non-repair of fences the plaintiff's cattle strayed on the defendant's land, and from thence on to the land of a third person, and the latter recovered damages from the plaintiff for trespass, and the amount of such damages was recovered by the plaintiff against the defendant; *Anon.* (1674), 1 Vent. 264, where, through non-repair by the defendant of a fence, the plaintiff's mare passed out of the plaintiff's land and was drowned in a ditch, and damages were awarded in respect of such loss; *Powell* v. *Salisbury* (1828), 2 Y. & J. 391, where under similar circumstances the plaintiff's horse strayed and was killed by the falling of a haystack on the defendant's rickyard, and it was held that damage for the death of the horse was not too remote; *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561, where an agister negligently left a gate open, and a mare which had been intrusted to him strayed into an adjoining cricket field, and the cricketers without negligence endeavoured to drive the mare back through the gate, but the animal, instead of passing through the gate, kicked against the fence and was injured, and it was held in an action against the agister that damage in respect of such injury was not too remote; *Firth* v. *Bowling Iron Co.* (1878), 3 C. P. D. 254, where defendant's neglect to repair a wire fence between his land and the plaintiff's, and which he was bound to repair, and pieces of the wire broke off and fell into the plaintiff's field, and the plaintiff's cow ate a piece of wire and was killed, and it was held that the plaintiff might recover the value of the cow; *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex. D. 5, where the defendant's yew tree spread itself over plaintiff's land, and the plaintiff's horse ate some of the leaves and was poisoned, and it was held that the plaintiff might recover the value of the horse. Compare *Ponting* v. *Noakes*, [1894] 2 Q. B. 281, where no part of the yew tree extended over the plaintiff's premises, and the defendant being under no liability to fence his property so as to keep the plaintiff's horse away from the yew tree, was not responsible to the plaintiff for injury to the horse.

(*f*) *Ellis* v. *Loftus Iron Co.* (1874), L. R. 10 C. P. 10, where the plaintiff kept a mare in his field and the defendant kept a horse in his field which adjoined, and the horse kicked through the wire fence which divided the two fields and injured the mare, and it was held that the damage to the mare was not too remote; *Lee* v. *Riley* (1865), 18 C. B. (N. S.) 722, where the defendant's mare strayed through a defective gate which the defendant was liable to repair into the plaintiff's field and kicked the plaintiff's horse, and it was held that damages for the injury to the horse were not too remote. Compare *Cox* v. *Burbidge* (1863), 13 C. B. (N. S.) 430, where the defendant's horse strayed on to the highway and kicked the plaintiff's child who was lawfully there, and it was held that the defendant was not liable for injury to the child, the distinction apparently being that whilst it is natural instinct or propensity for a horse to kick a mare, or for a mare to kick a horse, it is only a vicious animal who will kick a human being, and in this case it was not shown that the defendant had knowledge that his horse was vicious.

(*g*) *Sneesby* v. *Lancashire and Yorkshire Rail. Co.* (1875), 33 L. T. 372, C. A., where the defendants were guilty of negligence which caused drovers to lose control over cattle which they were driving along the high road, and the cattle

of some human being, damages in respect of such injury are not too remote.

The acts of children who are too young to take care of themselves are not to be regarded as acts of independent volition which break the chain of causality arising from the original act of a wrongdoer (*h*).

Illness caused by weather, fright etc.

**589.** Where a wrongful act has occasioned exposure to the weather and illness has resulted from such exposure, it seems that such illness is not to be regarded as due to an intervening and independent cause (*i*). Where a wrongful act has not caused direct bodily injury but has naturally occasioned extreme fright, and such fright has occasioned illness, it seems that such illness is not to be regarded as due to an intervening independent cause (*k*).

Supervening contingency.

**590.** Damages are too remote which depend upon a contingency supervening upon the act complained of. Thus, where a carrier wrongfully delays delivery of a model so that it is too late for a prize competition, damages cannot be recovered against him in respect of the loss of the prize (*l*). And where by reason of an

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rushed through a fence and injured the plaintiff's garden, and it was held that the damage done to the garden was not too remote, although the fence in question was defective.

(*h*) *Cooke* v. *Midland Great Western Rail. of Ireland*, [1909] A. C. 229; *Lynch* v. *Nurdin* (1841), 1 Q. B. 29; *Clark* v. *Chambers* (1878), 3 Q. B. D. 327, *per* COCKBURN, C.J., at p. 338, disapproving *Mangan* v. *Atterton* (1866), 4 H. & C. 388, and *Hughes* v. *Macfie* (1863), 2 H. & C. 744; compare *Gardner* v. *Grace* (1858), 1 F. & F. 359, where CHANNELL, B., asserts that the doctrine of contributory negligence does not apply to infants of tender years; see *contra*, *Singleton* v. *Eastern Counties Rail. Co.* (1859), 7 C. B. (N. S.) 287. See also *Jewson* v. *Gatti* (1886), 2 T. L. R. 388, 441; *Harrold* v. *Watney*, [1898] 2 Q. B. 320.

(*i*) In *Hobbs* v. *London and South Western Rail. Co.* (1875), L. R. 10 Q. B. 111, where by the negligence of the defendants the plaintiff and his wife were put in the wrong train, and were set down at a place at which they could procure no accommodation, and no conveyance to take them to their destination, and they were obliged to walk there notwithstanding bad weather, it was held that damages might be recovered for the inconvenience suffered, but that damages in respect of the illness of the wife caused through exposure to the weather were too remote. This decision was, however, questioned in *McMahon* v. *Field* (1881), 7 Q. B. D. 591, C. A., where the defendant had contracted to supply stabling for the plaintiff's horses, and the horses were wrongfully removed from the stable, and had to be kept in the cold without horse cloths whilst other stabling was sought, and the horses caught cold, and it was held that damages in respect of the illness of the horses and their consequent depreciation of value were not too remote; see also the next note.

(*k*) *Bell* v. *Great Northern Rail. Co.* (1890), 26 L. R. Ir. 428, where the court held that the negligence of the defendants was a cause of the injury, and at least *causa sine quâ non*, and further that there was no intervening independent cause; *Pugh* v. *London, Brighton and South Coast Rail. Co.*, [1896] 2 Q. B. 248, C. A.; *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57; *Dulieu* v. *White & Sons*, [1901] 2 K. B. 669, where damages resulting from a nervous shock occasioned by fright unaccompanied by any actual impact were awarded; disapproving *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222, P. C., where it was held that damages occasioned by a nervous shock due to the apprehension of a collision rendered imminent by the negligence of the defendants, but in fact averted, were too remote. See also *Isitt* v. *Railway Passengers Assurance Co.* (1889), 22 Q. B. D. 504; *Hamlyn* v. *Crown Accidental Insurance Co.*, [1893] 1 Q. B. 750, C. A.; and see *Re Scarr and General Accident Assurance Corporation*, [1905] 1 K. B. 387.

(*l*) *Watson* v. *Ambergate, Nottingham and Boston Rail. Co.* (1851), 15 Jur. 448,

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assault a person is rendered too unwell to apply for a situation which he would otherwise have applied for, the party committing the assault is not liable for damages for the loss of the situation (*m*). Such cases, however, seem to depend less upon the remoteness of the damage than upon the difficulty or impossibility of proving that the loss in fact occurred.

And so, where canal commissioners omit to give statutory notice to their lessee to execute repairs to the canal, and the canal falls into disrepair, and a barge travelling on the canal is delayed, the canal commissioners are not liable for damages for such delay; for it is uncertain whether the lessee would have executed the repairs even if he had received due notice (*n*).

Possibility of damage.

**591.** Conversely, the mere possibility that damage would have accrued even if the wrongful act had not been committed cannot be taken into account to exonerate a wrongdoer. Thus, where a bailee to whom goods have been committed for safe keeping at a particular place wrongfully transfers them to another place, and they are there destroyed or injured without any negligence on his part, he is liable for the full value of the goods, and it is no answer on his part to say that the goods might equally have been destroyed or injured if they had been warehoused in the place agreed upon (*o*).

Damage caused by plaintiff's conduct.

**592.** Where damage has been caused wholly or chiefly through the plaintiff's own act, and did not necessarily follow from the act complained of, such damage is too remote (*p*). This, however, must be taken with the qualification that where the intervening act of the plaintiff or his servant or agent has conduced to the injury caused by the original wrongful act of the defendant, the latter is nevertheless responsible, if by the exercise of reasonable care he could have avoided the consequences of such intervening act (*q*).

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*per* ERLE, J., at p. 450. Damages were, however, awarded in respect of the value of the labour and materials employed in making the model.

(*m*) *Hoey* v. *Felton* (1861), 11 C. B. (N. S.) 142; compare *Richardson* v. *Mellish* (1824), 2 Bing. 229, where compensation in respect of a contingency which was "almost a certainty" was awarded.

(*n*) *Walker* v. *Goe* (1859), 4 H. & N. 350, Ex. Ch.; compare *Collins* v. *Cave* (1860), 6 H. & N. 131, Ex. Ch.; *Cattle* v. *Stockton Waterworks* (1875), L. R. 10 Q. B. 453; *Anglo-Algerian Steamship Co., Ltd.* v. *Houlder Line, Ltd.*, [1908] 1 K. B. 659.

(*o*) *Lilley* v. *Doubleday* (1881), 7 Q. B. D. 510.

(*p*) *Ansett* v. *Marshall* (1853), 22 L. J. (Q. B.) 118. In this case the plaintiff, having taken a ticket for a voyage on defendant's ship, was not allowed to proceed on the voyage, because it was mistakenly thought that he had not paid his fare. The mistake was discovered almost immediately, and he was offered a passage in another of the defendant's vessels, but he refused this and remained in England for several months in order to sue the defendant, and it was held that he could not recover damages in respect of his expenses in remaining. See also *Hill* v. *Balls* (1857), 2 H. & N. 299; *Boyce* v. *Bayliffe* (1807), 1 Camp. 58; *Glover* v. *London and South Western Rail. Co.* (1867), L. R. 3 Q. B. 25; *Tucker* v. *Linger* (1882), 21 Ch. D. 18, C. A.; *Baldwin* v. *London, Chatham and Dover Rail. Co.* (1882), 9 Q. B. D. 582; and title NEGLIGENCE.

(*q*) *Tuff* v. *Warman* (1858), 5 C. B. (N. S.) 573, Ex. Ch.; *Butterfield* v. *Forrester* (1809), 11 East, 60; *Davies* v. *Mann* (1842), 10 M. & W. 546; *Dowell* v. *General Steam Navigation Co.* (1855), 5 E. & B. 195, 206; and see title NEGLIGENCE.

## SECT. 3.—*Aggravation and Mitigation.*

SECT. 3. Aggravation and Mitigation.

Aggravation.

**593.** In actions of contract as a rule the motives or conduct of the defendant are not to be taken into account in assessing damages, nor are damages to be awarded in respect of disappointment, wounded feelings, injury to reputation, or inconvenience (*r*). There are, however, some exceptions to this rule.

Breach of promise.

Damages for breach of promise of marriage are not measured by any definite standard, and are punitive in their character (*s*). In such a case damages may be given for the wounded feelings of the plaintiff, and if the defendant has seduced the plaintiff this is a matter proper to be considered, having regard to the disgrace attaching to her, and the circumstance that her chance of marrying another person will be diminished (*a*). The monetary loss sustained by the plainiff is to be taken into account, and the income of the defendant is a material fact in assessing damages (*b*). Damages in respect of specific monetary loss naturally resulting from the breach, as, for instance, the expenses of a trousseau, or the giving up of a contract of service, may be recovered if specially claimed (*b*).

Bankers.

**594.** In an action upon contract against a banker for refusing to pay a trader's cheques, although he has moneys of the trader in his hand, damages may be given for injury to the trader's credit. It is not necessary to prove that any damage has in fact been suffered, and such damages may be of substantial amount (*c*).

Agents.

The same principle applies in an action against an agent who has the money of his principal in hand and refuses or neglects to apply it as directed in honouring the cash orders of the principal (*d*).

Pain and suffering etc.

**595.** In cases in which damages are awarded for disgrace, wounded feelings, loss of credit or inconvenience, it is obviously impossible to assess the plaintiff's loss at a precise money value. And this is the case also when damages are awarded in respect of pain and suffering (*e*). The only limit which can be imposed is that the amount shall not be unreasonable.

In actions for personal injuries, whether such actions are founded on breach of contract to carry safely, or upon negligence, the jury are to award damages not only for the actual pecuniary loss

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(*r*) *Hamlin* v. *Great Northern Rail. Co.* (1856), 1 H. & N. 408.

(*s*) *Smith* v. *Woodfine* (1857), 1 C. B. (N. S.) 660; *Berry* v. *Da Costa* (1866), L. R. 1 C. P. 331; *Millington* v. *Loring* (1880), 6 Q. B. D. 190, C. A.; *Finlay* v. *Chirney* (1888), 20 Q. B. D. 494, C. A.

(*a*) *Berry* v. *Da Costa*, *supra*.

(*b*) *James* v. *Biddington* (1834), 6 C. & P. 589; *Kerfoot* v. *Marsden* (1860), 2 F. & F. 160; *Berry* v. *Da Costa*, *supra*.

(*c*) *Rolin* v. *Steward* (1854), 14 C. B. 595; *Shillibeer* v. *Glyn* (1836), 2 M. & W. 143; *Prehn* v. *Royal Bank of Liverpool* (1870), L. R. 5 Exch. 92; *Summers* v. *City Bank* (1874), L. R. 9 C. P. 580; and see *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415, where a banker had refused to pay the plaintiff's cheques though he had funds in his hands, and no injury was proved and nominal damages were given, substantial damages apparently not being contended for.

(*d*) *Boyd* v. *Fitt* (1863), 14 I. C. L. R. 43; *Larios* v. *Bonany y Gurety* (1873), L. R. 5 P. C. 346.

(*e*) *The Mediana*, [1900] A. C. 113, *per* Lord HALSBURY, L.C., at p. 116; and see p. 302, *ante*.

SECT. 3. Aggravation and Mitigation.

occasioned by the injury, but also for the pain and suffering of the plaintiff and the diminution of his capacity for the enjoyment of life, as well as in respect of the probable inability of the plaintiff to earn an income equal to that which he has earned in the past; and the probability that but for the injury the plaintiff might have earned an increasing income is to be taken into account (*f*).

Defamation.

**596.** In actions of tort, other than such as only affect property, wounded feelings and injury to the reputation are the principal subject-matter of damages, and the malicious or insulting conduct of the defendant may always be taken into account. Thus, damages in actions of defamation are given for injury to the reputation, and if the words are actionable in themselves no special damage need be proved, for temporal loss is presumed (*g*). Proof of a general falling off of profits is sufficient special damage to support a claim where the words are not actionable in themselves (*h*). Apart from general damages for injury to the reputation, special damages in the strict sense of the expression may be awarded if expressly claimed, in respect of any material temporal injury which has been suffered and which is the natural result of the defamatory words (*i*). Illness is not a natural result of defamatory words (*k*). The loss of the society of acquaintances may be the natural result of such words, but it does not constitute material or temporal injury so as to support a claim for special damages, unless it has involved the loss of hospitality (*a*).

Seduction.

**597.** In an action for seduction brought by a parent (*b*), although some evidence of service must be given (*c*), damages are awarded not only or principally for the loss of such service, but in respect of the injury to the feelings of the plaintiff whose daughter has been seduced (*d*). In assessing damages regard is to be had to the position and means of the parties (*e*), and the conduct of the defendant

(*f*) *Fair* v. *London and North Western Rail. Co.* (1869), 21 L. T. 326; see *Phillips* v. *London and South Western Rail. Co.* (1879), 5 Q. B. D. 78, C. A.; *Potter* v. *Metropolitan Rail. Co.* (1873), 28 L. T. 735.

(*g*) See title LIBEL AND SLANDER.

(*h*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A.; *Concaris* v. *Duncan & Co.*, [1909] W. N. 51.

(*i*) Damages in respect of the voluntary repetition of a slander by a third person to whom it is uttered are too remote (see p. 319, *ante*). But when the slander is uttered to a person whose duty it is to repeat it or in such circumstances that it is certain to be repeated, it is otherwise.

(*k*) *Allsop* v. *Allsop* (1860), 5 H. & N. 534. The principle of this case is confined to slander only (*Wilkinson* v. *Downton*, [1897] 2 Q. B. 57); compare *Weldon* v. *De Bathe* (1884), as reported 54 L. J. (Q. B.) 113, 116, C. A.

(*a*) *Moore* v. *Meagher* (1807), 1 Taunt. 39, Ex. Ch.; *Davies* v. *Solomon* (1871), L. R. 7 Q. B. 112.

(*b*) A master who is not *in loco parentis* can only recover out-of-pocket expenses (*McKenzie* v. *Hardinge* (1906), 23 T. L. R. 15).

(*c*) Consequently, the action cannot be maintained by a parent against the seducer, if he is the girl's master (*Whitbourne* v. *Williams*, [1901] 2 K. B. 722, C. A.), unless the hiring was made with a view to the seduction (*Speight* v. *Oliviera* (1819), 2 Stark. 493).

(*d*) *Bedford* v. *M'Kowl* (1800), 3 Esp. 119; *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599, per BLACKBURN, J., at p. 602; *Appleby* v. *Franklin* (1885), 17 Q. B. D. 93.

(*e*) *Andrews* v. *Askey* (1837), 8 C. & P. 7. Direct evidence of the amount of

in effecting the ruin of the plaintiff's daughter by fraud or under cover of a promise of marriage may be taken into consideration (*f*).

Trespass etc.

**598**. Even in actions of tort which affect the property and do not immediately affect the character or person, the conduct of the defendant may be taken into account in estimating the amount of damage to be awarded. Thus, where a trespass to land (*g*) or the seizure of goods (*h*) is accompanied by insulting or oppressive conduct, damages of large amount may be awarded although the actual injury is trifling.

Mitigation of damages.

**599**. Since the injured party is entitled to recover compensation only, the defendant is at liberty to give evidence in mitigation of damages (*i*). Thus, in the case of breach of contract, he may show how much less the subject-matter of the contract is worth (*k*) by reason of the plaintiff's misconduct or non-fulfilment of what he is bound to perform, as, for instance, by a breach of warranty (*l*). Similarly, in the case of tort, the defendant may show that the loss has been increased by the conduct of the plaintiff (*m*), or diminished by his own conduct (*n*), or, in particular cases, that the plaintiff's character is such as to disentitle him to recover the damages which might otherwise have been awarded (*o*). But the defendant is not at liberty to go into collateral matters (*p*), or into matters which would be a bar to the action, without specially pleading them (*q*).

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the defendant's wealth cannot, it seems, be given; see *Hodsoll* v. *Taylor* (1873), L. R. 9 Q. B. 79, *per* BLACKBURN, J., at pp. 81, 82.

(*f*) But see *Dodd* v. *Norris* (1814), 3 Camp. 519, where it was said that the plaintiff was not entitled to give evidence of a promise of marriage prior to the seduction; *Tullidge* v. *Wade* (1769), 3 Wils. 18; and see title MASTER AND SERVANT. Where a daughter is "enticed away" from service in her father's employ, and there is no "seduction" in the sense of corporal misconduct, the damages, in the absence of evidence of express malice, are limited to the actual loss of the parent (*Evans* v. *Walton* (1867), L. R. 2 C. P. 615). And this is so in all cases where a master sues for the enticing away of an employee (*Gunter* v. *Astor* (1819), 4 Moore (C. P.), 12). But damages are not limited to the period during which the servant was bound to remain in the master's service. The jury may assume that but for the act of the defendant the servant would have continued indefinitely in the master's employ (*ibid.*).

(*g*) *Merest* v. *Harvey* (1814), 5 Taunt. 442.

(*h*) *Massey* v. *Sladen* (1868), L. R. 4 Exch. 13; *Moore* v. *Shelley* (1883), 8 App. Cas. 285, 294, P. C.

(*i*) *Thornton* v. *Place* (1832), 1 Mood. & R. 218; *Denew* v. *Daverell* (1813), 3 Camp. 451; *Le Lois* v. *Bristow* (1815), 4 Camp. 134; *Oldershaw* v. *Holt* (1840), 12 Ad. & El. 590. As to pleading in mitigation of damage, see p. 346, *post*.

(*k*) *Allen* v. *Cameron* (1833), 1 Cr. & M. 832.

(*l*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53; *Street* v. *Blay* (1831), 2 B. & Ad. 456; *Poulton* v. *Lattimore* (1829), 9 B. & C. 259.

(*m*) *Arden* v. *Goodacre* (1851), 11 C. B. 371; *Hiort* v. *London and North Western Rail. Co.* (1879), 4 Ex. D. 188, C. A.; *Chinn* v. *Morris* (1826), 2 C. & P. 361; *May* v. *Brown* (1824), 3 B. & C. 113.

(*n*) *Mountford* v. *Gibson* (1804), 4 East, 441; Libel Act, 1843 (6 & 7 Vict. c. 96), s. 1; *Cook* v. *Hartle* (1838), 8 C. & P. 568.

(*o*) *Leeds* v. *Cook* (1803), 4 Esp. 256; *Scott* v. *Sampson* (1882), 8 Q. B. D. 491; see, further, title LIBEL AND SLANDER.

(*p*) *Simpson* v. *Thompson* (1877), 3 App. Cas. 279; *Yates* v. *Whyte* (1838), 4 Bing. (N. C.) 272; *Jebsen* v. *East and West India Dock Co.* (1875), L. R. 10 C. P. 300; *Creevy* v. *Carr* (1835), 7 C. & P. 64.

(*q*) *Watson* v. *Christie* (1800), 2 Bos. & P. 224; *Speck* v. *Phillips* (1839), 5 M. & W. 279.

SECT. 3. Aggravation and Mitigation.

Nor is the extent of the defendant's liability affected by the fact that in consequence of his conduct a sum of money is paid to the plaintiff under a policy of insurance (*r*).

### SECT. 4.—*Recovery of Costs.*

Costs of legal proceedings.

**600.** Where in consequence of the defendant's wrongful act the plaintiff has incurred costs in legal proceedings with third parties, such costs may be recovered from the defendant if they were reasonably incurred (*s*), but if they were not reasonably incurred they are to be regarded as due to the conduct of the plaintiff, and are too remote (*t*).

Thus, where an agent purports to contract with the plaintiff on behalf of his principal and thereby (*u*) warrants that he has authority to do so, but in fact has no such authority, and the plaintiff sues the principal upon the contract and is defeated and ordered to pay the principal's costs, the plaintiff may, if he has acted reasonably, recover such costs in an action against the agent, together with the plaintiff's own costs incurred in bringing the action against the principal (*x*). It is not reasonable to bring such an action if before bringing it the plaintiff has been made aware that the agent acted without authority. But if the agent has been made aware of the plaintiff's intention to bring the action, and has shown his approval or has not manifested disapproval, and has not

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(*r*) *Bradburn* v. *Great Western Rail. Co.* (1874), L. R. 10 Exch. 1 (insurance against accident); *Cullen* v. *Butler* (1816), 5 M. & S. 461; *Yates* v. *Whyte* (1838), 4 Bing. (N. C.) 272 (marine insurance); Fatal Accidents (Damages) Act, 1908 (8 Edw. 7, c. 7) (life insurance), rendering *Hicks* v. *Newport, Abergavenny and Hereford Rail. Co.* (1857), cited 4 B. & S. 403, n., approved in *Grand Trunk Rail. Co. of Canada* v. *Jennings* (1888), 13 App. Cas. 800, P. C., no longer law. See, further, title INSURANCE.

(*s*) If the plaintiff omits to claim such costs in the action brought against the defendant in respect of such wrongful act, he cannot afterwards bring a separate action to recover them (*Furness, Withy & Co., Ltd.* v. *Hall* (*J. & E.*), *Ltd.* (1909), 25 T. L. R. 233).

(*t*) The principle extends to cases where the legal proceedings are not against third parties. Thus, where at a time when damages could not be recovered in an action for specific performance, a plaintiff sued the defendant in Chancery for specific performance and failed, and then sued him at common law for damages and succeeded, it was held that he could not in this action recover the costs of the Chancery suit, as the latter was not necessarily a consequence of the breach of contract (*Hodges* v. *Litchfield* (*Earl*) (1835), 1 Bing. (N. C.) 492). On the other hand, where the plaintiff sued a coroner for false imprisonment, it was held that he was entitled to recover the costs of proceedings to quash the inquisition (*Foxall* v. *Barnett* (1853), 2 E. & B. 928). Compare *Holloway* v. *Turner* (1845), 6 Q. B. 928.

Where costs are necessarily incurred it follows that they are reasonably incurred. Thus, if a landlord who is entitled to possession of premises at the end of a lease is obliged to eject an undertenant who holds over, he is entitled to recover the costs of the ejectment proceedings against his tenant (*Henderson* v. *Squire* (1869), L. R. 4 Q. B. 170; and see *Bramley* v. *Chesterton* (1857), 2 C. B. (N. S.) 592).

(*u*) *Collen* v. *Wright* (1857), 8 E. & B. 647, Ex. Ch.; *Starkey* v. *Bank of England*, [1903] A. C. 114.

(*x*) *Collen* v. *Wright, supra; Starkey* v. *Bank of England, supra; Randell* v. *Trimen* (1856), 18 C. B. 786; *Hughes* v. *Graeme* (1864), 33 L. J. (Q. B.) 335; *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295; *Chr. Salvesen & Co.* v. *Rederi Aktiebolaget Nordstjernan*, [1905] A. C. 302.

admitted his want of authority, the costs of the action against the principal are reasonably incurred (*a*).

Action by third party.

**601.** And so where by reason of the defendant's breach of contract (*b*) or other wrongful act the plaintiff has incurred liability towards a third party and is sued by such third party, the costs incurred by the plaintiff in defending such action may be recovered against the defendant, if it was reasonable under the circumstances for the plaintiff to have defended the action brought against him (*c*).

If the plaintiff knew (*d*) or ought to have known (*e*) that he had no defence against the third party, his conduct in defending is not reasonable, and it seems that it is not rendered reasonable because the damages awarded in such action may afford a measure of the damages to be recovered against the defendant (*f*).

If the defendant has assented to the plaintiff defending the action brought by the third party, he thereby admits that there were reasonable grounds for defence (*g*), and the defendant's assent may

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(*a*) *Hughes* v. *Graeme* (1864), 33 L. J. (Q. B.) 335; *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295.

(*b*) As, for instance, where the terms of a sub-contract have been communicated to a seller at the time of the contract (see p. 315, *ante*), or where goods have been sold with a warranty which it is reasonable to suppose will be resold with a like warranty (see pp. 314, 315, *ante*).

(*c*) *Hammond & Co.* v. *Bussey* (1887), 20 Q. B. D. 79, C. A.; *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q. B. 413, C. A.; *Fisher* v. *Val de Travers Asphalte Co.* (1876), 1 C. P. D. 511; *Mors-le-Blanch* v. *Wilson* (1873), L. R. 8 C. P. 227; *Baxendale* v. *London, Chatham and Dover Rail. Co.* (1874), L. R. 10 Exch. 35, Ex. Ch.; *Re Wells, Ex parte Official Receiver* (1895), 72 L. T. 359; *Vogan & Co.* v. *Oulton* (1899), 81 L. T. 435, C. A.; *Prince of Wales Dry Dock Co. (Swansea), Ltd.* v. *Fownes Forge and Engineering Co., Ltd.* (1904), 90 L. T. 527, C. A.; *Great Western Rail.* v. *Fisher*, [1905] 1 Ch. 316; *The Millwall*, [1905] P. 155, C. A., *per* COZENS-HARDY, L.J., at p. 176; compare *Assicurazioni Generali de Trieste* v. *Empress Assurance Corporation, Ltd.*, [1907] 2 K. B. 815, *per* PICKFORD, J., at p. 821. The right to recover costs does not extend to the costs of an appeal (*Maxwell* v. *British Thomson Houston Co.*, [1904] 2 K. B. 342; *Shepheard* v. *Bray*, [1906] 2 Ch. 235, 254).

(*d*) *Short* v. *Kalloway* (1839), 11 Ad. & El. 28; *Tindall* v. *Bell* (1843), 11 M. & W. 228; *Roach* v. *Thompson* (1830), 4 C. & P. 194; *Bleaden* v. *Charles* (1831), 7 Bing. 246; *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295; *Pow* v. *Davis* (1861), 1 B. & S. 220; *The Wallsend*, [1907] P. 302.

(*e*) *Wrightup* v. *Chamberlain* (1839), 7 Scott, 598, where the plaintiff bought a horse from the defendant with a warranty, and kept it for a time and then resold it with a like warranty, and was sued by the purchaser, and had to pay damages and costs, and in the plaintiff's action against the defendant the jury found that the plaintiff ought to have discovered that the horse was unsound before he resold it, and it was held that the plaintiff was not entitled to recover in respect of such costs from the defendant.

(*f*) The case of *Mors-le-Blanch* v. *Wilson*, *supra*, was supposed to have laid down the rule that the costs of defending an action brought by a third party might be recovered even if the defence was unreasonable, if the incurring of such costs had been of use as leading to the assessment of the damages which could be recovered against the defendant. But in *Hammond & Co.* v. *Bussey*, *supra*, it seems to have been determined that the supposed rule was not in fact laid down in *Mors-le-Blanch* v. *Wilson*, *supra*, and that in any case such rule could not be supported.

(*g*) *Williams* v. *Burrell* (1845), 1 C. B. 402; *Howes* v. *Martin* (1794), 1 Esp 162.

SECT. 4. Recovery of Costs.

be implied from the fact that after notice of such action he did not take any step to prevent the plaintiff from defending it (*h*).

Covenants in leases.

**602.** Where a lessee has been sued and held liable upon covenants to repair he cannot recover the costs of such action from his underlessee, who is bound by like covenants towards the lessee —for here the damage suffered is the consequence of the lessee's own default; and, moreover, the covenants, although identical in words, are different in substance (*i*). But where an underlessee or assignee covenants to indemnify the lessee against a breach of the lessee's covenants, the costs of an action brought against the lessee for breach of his covenants are recoverable against such underlessee or assignee (*k*).

Contracts of indemnity.

**603.** In all cases where there is a contract of indemnity the costs of legal proceedings properly incurred by the plaintiff are recoverable under the indemnity (*l*), and in such cases it seems that the full costs as between solicitor and client are to be awarded (*m*). But the person indemnified is not entitled to defend an action which must obviously be decided against him (*n*).

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# Part III.—Liquidated Damages or Penalty.

Distinction between liquidated damages and penalty.

**604.** The parties to a contract may at the time of entering into it provide that in case of breach the party in default is to pay to the other a sum certain specified in, or ascertainable from, the contract. This sum may be either liquidated damages, in which case it is not to be interfered with by the court (*o*), or a penalty, which covers the loss if proved but does not assess it, and therefore cannot

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(*h*) *Blyth* v. *Smith* (1843), 5 Man. & G. 405; *Rolph* v. *Crouch* (1867), L. R. 3 Exch. 44.

(*i*) *Penley* v. *Watts* (1841), 7 M. & W. 601; *Walker* v. *Hatton* (1842), 10 M. & W. 249; *Logan* v. *Hall* (1847), 4 C. B. 598; *Pontifex* v. *Foord* (1884), 12 Q. B. D. 152.

(*k*) *Gooch* v. *Clutterbuck*, [1899] 2 Q. B. 148, C. A.

(*l*) *Duffield* v. *Scott* (1789), 3 Term Rep. 374; *Jones* v. *Williams* (1841), 7 M. & W. 493; *The Millwall*, [1905] P. 155, C. A.

(*m*) *Smith* v. *Compton* (1832), 3 B. & Ad. 407; *Howard* v. *Lovegrove* (1870), L. R. 6 Exch. 43; *Born* v. *Turner*, [1900] 2 Ch. 211; *Barnett* v. *Eccles Corporation*, [1900] 2 Q. B. 423, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 428. In *Maxwell* v. *British Thomson Houston Co.*, [1904] 2 K. B. 342, 344, it was said that a person who is indemnifying another against the costs of an action cannot, unless there are some special circumstances, be called upon to pay them as between solicitor and client. But it would appear that there is a distinction between the case of a person who is entitled by contract to an indemnity and the case of a person who is simply recovering damages. In the former case he may recover solicitor and client costs, but not in the latter (*Great Western Rail.* v. *Fisher*, [1905] 1 Ch. 316, at p. 324; *Born* v. *Turner*, *supra*; *Barnett* v. *Eccles Corporation*, *supra*).

(*n*) *Knight* v. *Hughes* (1828), Mood. & M. 247; *Gillett* v. *Rippon* (1829), Mood. & M. 406.

(*o*) *Public Works Commissioner* v. *Hills*, [1906] A. C. 368, 375, P. C.; compare *Lea* v. *Whitaker* (1872), L. R. 8 C. P. 70, *per* KEATING, J., at p. 73.

be recovered as such (*p*). If it is a sum which can be regarded as a genuine pre-estimate by the parties of the loss which they contemplated would flow from the breach, it is liquidated damages (*q*). If on the other hand the sum does not attempt to assess the loss, but is imposed as security for the due performance of the contract, it is a penalty (*a*).

How determined.

**605.** Whether the sum is a penalty or liquidated damages in any given case is a question of construction for the judge alone (*b*). In deciding this question he must take into consideration the intention of the parties (*c*), as evidenced by their language (*d*) and the circumstances of the case, which, however, must be taken as a whole and viewed as at the time the contract was made (*e*).

The rules for distinguishing between a penalty and liquidated damages are as follows:—

Intention of parties.

(1) Where the parties themselves call the sum made payable a penalty, the onus lies on those who seek to show that it is liquidated damages to show that such was the intention (*f*).

Power of court.

(2) But though the parties themselves call the sum to be paid liquidated damages, and even if they go so far as to state in the contract that it is not a penalty, this will not prevent the court in a proper case from holding that it is in fact a penalty (*g*).

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(*p*) *Thompson* v. *Hudson* (1869), L. R. 4 H. L. 1; *Magee* v. *Lavell* (1874), L. R. 9 C. P. 107; *Law* v. *Redditch Local Board*, [1892] 1 Q. B. 127, C. A. As to the assignment of breaches under stat. (1696) 8 & 9 Will. 3, c. 11, see title BONDS, Vol. III., pp. 94, 101.

(*q*) *Public Works Commissioner* v. *Hills*, [1906] A. C. 368, P. C., following *Clydebank Engineering and Shipbuilding Co., Ltd.* v. *Yzquierdo y Castaneda*, [1905] A. C. 6, where the words "genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation" were adopted from the judgment of Lord KYLLACHY in the court below ((1903), 5 F. (Ct. of Sess.) 1016); compare *Crisdee* v. *Bolton* (1827), 3 C. & P. 240, *per* BEST, C.J., at p. 243.

(*a*) *Lowe* v. *Peers* (1768), 4 Burr. 2225, 2229; *Kemble* v. *Farren* (1829), 6 Bing. 141, 148; *Law* v. *Redditch Local Board*, [1892] 1 Q. B. 127, C. A.

(*b*) *Sainter* v. *Ferguson* (1849), 7 C. B. 716; *Magee* v. *Lavell* (1874), L. R. 9 C. P. 107; *Willson* v. *Love*, [1898] 1 Q. B. 625, *per* Lord ESHER, M.R., at p. 629.

(*c*) *Reynolds* v. *Bridge* (1856), 6 E. & B. 528; *Dimech* v. *Corlett* (1858), 12 Moo. P. C. C. 199, 229.

(*d*) *Ibid.*; *Lea* v. *Whitaker* (1872), L. R. 8 C. P. 70, *per* KEATING, J., at p. 73.

(*e*) *Public Works Commissioner* v. *Hills*, *supra*; *Pye* v. *British Automobile Commercial Syndicate, Ltd.*, [1906] 1 K. B. 425, *per* BIGHAM, J., at p. 430; compare *Sainter* v. *Ferguson*, *supra*, *per* COLTMAN, J., at p. 728.

(*f*) *Willson* v. *Love*, [1896] 1 Q. B. 626, C.A., *per* Lord ESHER, M.R., at p. 630; *Clydebank Engineering and Shipbuilding Co., Ltd.* v. *Yzquierdo y Castaneda*, *supra*; see also *Sainter* v. *Ferguson*, *supra*; *Parfitt* v. *Chambre* (1872), L. R. 15 Eq. 36; *Re White and Arthur* (1901), 84 L. T. 594; and compare *Sparrow* v. *Paris* (1862), 7 H. & N. 594; *Diestal* v. *Stevenson*, [1906] 2 K. B. 345, where, though the sum was called a penalty, it was held to be liquidated damages. Where it is doubtful from the terms of the contract whether the parties mean that the sum mentioned in it shall be a penalty or liquidated damages, the sum is, as a rule, to be taken as a penalty (*Crisdee* v. *Bolton*, *supra*, *per* BEST, C.J., at p. 243; compare *Barton* v. *Glover* (1815), Holt (N. P.), 43).

(*g*) *Kemble* v. *Farren*, *supra*; *Green* v. *Price* (1845), 13 M. & W. 695, *per* PARKE, B., at p. 701, affirmed (1847) 16 M. & W. 346, Ex. Ch.; *Coles* v. *Sims* (1854), 23 L. J. (CH.) 258, C. A.; *Betts* v. *Burch* (1859), 4 H. & N. 506, *per* BRAMWELL, B., at p. 511; *Thompson* v. *Hudson* (1869), L. R. 4 H. L. 1, *per*

PART III. Liquidated Damages or Penalty.

(3) Where a larger sum is to become payable in consequence of the non-payment of a smaller sum, the larger sum will be held to be a penalty (*h*).

Larger sum in default of paying smaller sum.

(4) Where a contract contains a variety of stipulations, some of a certain nature and amount, as, for instance, for the payment of a lesser sum of money (*i*), and some of an uncertain nature and amount, and one large sum is stated at the end to be payable in the event of a breach of performance of any of them, that sum is to be considered in the nature of a penalty (*k*); for as it cannot be regarded as liquidated damages in respect of some of the stipulations it ought not to be so regarded in respect of the others (*l*).

Varied stipulations.

Damages unascertainable.

(5) Where a contract contains a variety of stipulations, and the amount of damages for the breach of each stipulation is unascertainable, or not readily ascertainable, then the sum payable on the breach of any of the stipulations is liquidated damages (*m*). The fact that the stipulations are of different degrees of importance is not of itself sufficient to show that the sum payable is a penalty (*n*), except where some of the stipulations are of such a character that

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Lord WESTBURY, at p. 30; *Magee* v. *Lavell, supra; Re Newman, Ex parte Capper* (1876), 4 Ch. D. 724, 731, C. A.; *Clydebank Engineering and Shipbuilding Co., Ltd.* v. *Yzquierdo y Castaneda*, [1905] A. C. 6. But the expression is only to be disregarded in cases where the plain intention of the parties, to be gathered from all the circumstances of the case, is that the sum is to be a penalty (*Pye* v. *British Automobile Commercial Syndicate, Ltd.*, [1906] 1 K. B. 425, *per* BIGHAM, J., at p. 430).

(*h*) *Kemble* v. *Farren* (1829), 6 Bing. 141, *per* TINDAL, C.J., at p. 148; *Astley* v. *Weldon* (1801), 2 Bos. & P. 346, *per* CHAMBRE, J., at p. 354; *Davies* v. *Penton* (1827), 6 B. & C. 216; *Betts* v. *Burch* (1859), 4 H. & N. 506; *Thompson* v. *Hudson* (1869), L. R. 4 H. L. 1, *per* Lord HATHERLEY, L.C., at p. 15; *Re Newman, Ex parte Capper* (1876), 4 Ch. D. 724, C. A.; *Wallis* v. *Smith* (1882), 21 Ch. D. 243, C. A., *per* JESSEL, M.R., at p. 256; *Law* v. *Redditch Local Board*, [1892] 1 Q. B. 127, C. A., *per* Lord ESHER, M.R., at p. 130.

Care must be taken to differentiate cases of this kind from those in which, for example, it is agreed to charge a certain rate of interest on the condition that if the payment be made punctually a lesser rate will be accepted (*Astley* v. *Weldon, supra, per* HEATH, J., at p. 352; *Thompson* v. *Hudson, supra; Ashtown (Lord)* v. *White* (1847), 11 I. L. R. 400). Equally in a payment of a sum of money by instalments a stipulation that in the event of one instalment falling in arrear the whole sum is to become immediately payable is good, and the court will not relieve against it on the ground that it is in the nature of a penalty (*Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685; *Protector Loan Co.* v. *Grice* (1880), 5 Q. B. D. 592, C. A.).

(*i*) *Kemble* v. *Farren, supra, per* TINDAL, C.J., at p. 148; *Wallis* v. *Smith, supra, per* JESSEL, M.R., at p. 256.

(*k*) *Reynolds* v. *Bridge* (1856), 6 E. & B. 528, *per* COLERIDGE, J., at p. 540; *Astley* v. *Weldon, supra, per* Lord ELDON, C.J., at pp. 350, 352; *Magee* v. *Lavell* (1874), L. R. 9 C. P. 107, *per* Lord COLERIDGE, C.J., at p. 111, approved in *Re Newman, Ex parte Capper, supra, per* BRAMWELL, L.J., at p. 733; *Pye* v. *British Automobile Commercial Syndicate, Ltd., supra, per* BIGHAM, J., at p. 429; and compare *Elphinstone (Lord)* v. *Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332, *per* Lord WATSON, at p. 342; *Bradley* v. *Walsh* (1903), 88 L. T. 737.

(*l*) *Reynolds* v. *Bridge, supra.*

(*m*) *Atkyns* v. *Kinnier* (1850), 4 Exch. 776, *per* PARKE, B., at p. 783; *Galsworthy* v. *Strutt* (1848), 1 Exch. 659; *Reynolds* v. *Bridge, supra;* compare *Wallis* v. *Smith, supra, per* JESSEL, M.R., at p. 258.

(*n*) *Pye* v. *British Automobile Commercial Syndicate, Ltd., supra;* compare *Kemble* v. *Farren, supra,* at p. 148; *Wallis* v. *Smith, supra, per* COTTON, L.J., at p. 270.

the damages which can possibly arise from a breach of any of them would be very insignificant compared with the sum fixed by the parties (*o*).

Single stipulation.

(6) Where a contract contains only a single stipulation, on the breach of which a specified sum, whether large or small, is to become payable, such a sum is liquidated damages, provided that there is no adequate means of ascertaining the precise damage which may result from the breach (*p*); but if the single stipulation is only of very trivial importance or can only give rise to nominal damages, and the sum payable is considerable, the disproportion between the two may be so great as to make it plain that the sum was fixed as a penalty (*q*).

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# Part IV.—Measure of Damages.

## SECT. 1.—*In General.*

Definition and nature.

**606.** By the measure of damages is meant the standard or method of calculation by which the amount of damages is to be assessed.

The measure of damages in particular actions or with regard to any particular kind of loss is the rule derived from judicial decisions, establishing what is to be normally regarded as the damage naturally resulting in actions of that class or with reference to loss of that kind.

In many cases this measure affords a means of exact, or approximately exact, computation of the amount to be recovered. But where damages are recoverable in respect of injuries to the reputation or feelings, or in respect of pain and suffering or inconvenience, a jury, or the tribunal that stands in the place of a jury, must estimate them in the best way they can, applying the rules of common sense and ordinary life. Where damages are not only compensatory to the plaintiff, but also punitive to the defendant, as in actions which are based upon, or may be aggravated by, the evil motives or insulting conduct of the defendant, there is no

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(*o*) *Davies* v. *Penton* (1827), 6 B. & C. 216, *per* BAYLEY, J., at p. 223, approved in *Horner* v. *Flintoff* (1842), 9 M. & W. 678, *per* ALDERSON, B., at p. 681; *Wallis* v. *Smith* (1882), 21 Ch. D. 243, C. A., *per* JESSEL, M.R., at p. 265, and *per* COTTON, L.J., at p. 270.

(*p*) *Lea* v. *Whitaker* (1872), L. R. 8 C. P. 70; *Astley* v. *Weldon* (1801), 2 Bos. & P. 346, *per* Lord ELDON, C.J., at p. 351; *Sainter* v. *Ferguson* (1849), 7 C. B. 716, *per* CRESSWELL, J., at p. 730; *Sparrow* v. *Paris* (1862), 7 H. & N. 594; and compare *Reynolds* v. *Bridge* (1856), 6 E. & B. 528; *Law* v. *Redditch Local Board*, [1892] 1 Q. B. 127, C. A.; *Ward* v. *Monaghan* (1895), 11 T. L. R. 529, C. A.; *Strickland* v. *Williams*, [1899] 1 Q. B. 382, C. A.; see also *Roy* v. *Beaufort* (*Duke*) (1741), 2 Atk. 190; *Barton* v. *Glover* (1815), Holt (N. P.), 43; *Green* v. *Price* (1845), 13 M. & W. 695; *Rawlinson* v. *Clarke* (1845), 14 M. & W. 187; *Galsworthy* v. *Strutt* (1848), 1 Exch. 659.

(*q*) *Law* v. *Redditch Local Board*, *supra*, *per* Lord ESHER, M.R., at p. 130; *Rayner* v. *Rederiaktiebolaget Condor*, [1895] 2 Q. B. 289; *Jones* v. *Hough* (1879), 5 Ex. D. 115, C. A.; and compare also *Wallis* v. *Smith*, *supra*, and *Sparrow* v. *Paris*, *supra*.

SECT. 1. In General.

measure of damages in the sense of an approximate standard of money value. The only limit imposed in such cases is that the damages awarded must not be unreasonably large or unreasonably small. In actions of this character the principle is maintained that damages are only recoverable in respect of loss which arises naturally from the wrongful act, but the only measure of damages which can be supplied consists in an enumeration of the kinds of injury or loss which are to be taken into account, and the matters which are proper for consideration in arriving at a reasonable sum (*a*).

## SECT. 2.—*In Contract.*

Measure in contract.

**607.** Apart from damages for pain and suffering, and apart from the exceptional cases in which the conduct of the defendant or the injured feelings of the plaintiff may be taken into account, the measure of damages in actions of contract is definite, in the sense that by applying the appropriate measure such damages may be computed precisely or with an approach to precision (*b*).

To pay or lend money.

**608.** Upon breach of a contract to pay money due the damages are limited to the amount of the debt together with interest from the time when it became due (*c*). But upon breach of a contract to lend money the additional expense incurred in obtaining the loan elsewhere is a natural result of the breach and may be recovered (*d*), or such other substantial damage as was within the contemplation of the parties (*e*). A contract to take debentures is not a mere contract to lend money, and upon breach of such a contract the company can only recover the actual loss they have sustained (*f*).

Non-delivery of shares.

**609.** In an action for the non-delivery of shares, the measure of damages is the difference between the contract price and the market price at the date of breach (*g*). In an action for withholding shares

(*a*) See p. 323, *ante*.

(*b*) *Fletcher* v. *Tayleur* (1855), 17 C. B. 21, *per* WILLES, J., at p. 29. As to interest under the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28, and damages in lieu of such interest as the statute allows, where one party has been prevented from complying with its terms by the conduct of the other party, see *London, Chatham and Dover Railway* v. *South Eastern Railway*, [1892] 1 Ch. 120, C. A., *per* BOWEN and KAY, L.JJ., at pp. 147, 151, and the rule at common law stated *per* Lord HERSCHELL, L.C., S. C., [1893] A. C. 429, at p. 439. See also title MONEY AND MONEY LENDING.

(*c*) *Hamlin* v. *Great Northern Rail. Co.* (1856), 1 H. & N. 408, *per* POLLOCK, C.B., at p. 411.

(*d*) *Prehn* v. *Royal Bank of Liverpool* (1870), L. R. 5 Exch. 92.

(*e*) *Larios* v. *Bonany y Gurety* (1873), L. R. 5 P. C. 346, 358; *Boyd* v. *Fitt* (1863), 14 I. C. L. R. 43. On a contract to make a loan the measure of damages is the loss sustained by the breach. Such damages may be nominal (*Western Wagon and Property Co.* v. *West*, [1892] 1 Ch. 271, *per* CHITTY, J., at p. 277). See also *Manchester and Oldham Bank* v. *Cook & Co.* (1883), 49 L. T. 674, where, however, the defendants had express notice of the purpose for which the money was required, and the plaintiff was in effect deprived of the opportunity of procuring it elsewhere.

(*f*) *South African Territories* v. *Wallington*, [1897] 1 Q. B. 692, affirmed [1898] A. C. 309; *Bahamas Sisal Plantation* v. *Griffin* (1897), 14 T. L. R. 139.

(*g*) *Shaw* v. *Holland* (1846), 15 M. & W. 136; *Powell* v. *Jessopp* (1856), 18 C. B. 336; and see *Michael* v. *Hart & Co.*, [1902] 1 K. B. 482, C. A. The difference

after tender of the sum due for calls and interest, the damages naturally resulting are the value of the shares at the market price on the day of tender, deducting the amount of calls and interest (*h*). Where there has been a loan of stock or shares and they have not been replaced, the measure of damage is the value of the stock or shares; and if the value has risen at the time of trial, the value at that date is to be taken (*i*). If the value has fallen at the date of the trial, it seems that the value should be estimated at the date when the stock or shares ought to have been replaced (*k*), or if no date was fixed for their replacement, at the date of the loan (*l*). But the value cannot be estimated at the highest price which the stock and shares have reached between the date of the loan and that of the trial (*m*).

Non-delivery of goods sold.

**610.** When upon a sale of goods the seller fails to deliver them if there is a market for such goods, the measure of damages is the difference between the contract price and the market price at the date when the goods should have been delivered (*n*). There is no difference in this respect whether the goods in question are manufactured or unmanufactured (*o*).

When the seller fails to deliver and there is no market, the buyer is entitled to be awarded an amount which represents the value of the goods to him at the date when delivery should have been made (*p*), and the profit which he would have made on a contract of subsale which he had entered into is evidence of such value, though the seller had no notice of such contract (*q*).

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is more properly that between the contract price and the market price on the day after the breach, for the defendant has the whole of the day fixed for delivery on which to deliver (*Shaw* v. *Holland* (1846), 15 M. & W. 136).

(*h*) *Van Diemen's Land Co.* v. *Cockerell* (1857), 1 C. B. (N. S.) 732, Ex. Ch.

(*i*) *Harrison* v. *Harrison* (1824), 1 C. & P. 412; *Shepherd* v. *Johnson* (1802), 2 East, 211; *Gainsford* v. *Carroll* (1824), 2 B. & C. 624; *Owen* v. *Routh* (1854), 14 C. B. 327, where it seems to have been considered that the value was to be taken at the date of the trial independently of any question whether the shares had risen.

(*k*) *Sanders* v. *Kentish* (1799), 8 Term Rep. 162.

(*l*) *Forrest* v. *Elwes* (1799), 4 Ves. 492.

(*m*) *M'Arthur* v. *Seaforth* (*Lord*) (1810), 2 Taunt. 257; *Simmons* v. *London Joint Stock Bank*, [1891] 1 Ch. 284, C. A. But see *Archer* v. *Williams* (1846), 2 Car. & Kir. 26, where the action was in detinue for scrip and the market value of the scrip had diminished, and it was suggested that the plaintiff was entitled to the highest value of the scrip between the date of detention and the date of trial; *Michael* v. *Hart*, [1902] 1 K. B. 482, C. A.

(*n*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51; *Startup* v. *Cortazzi* (1835), 2 Cr. M. & R. 165; *Josling* v. *Irvine* (1861), 6 H. & N. 512; *Williams* v. *Reynolds* (1865), 6 B. & S. 495; *Tredegar Iron and Coal Co.* v. *Gielgud* (1883), Cab. & El. 27; *Valpy* v. *Oakley* (1851), 16 Q. B. 941; *Gainsford* v. *Carroll*, *supra*; *Peterson* v. *Ayre* (1853), 13 C. B. 353; *Barrow* v. *Arnaud* (1846), 8 Q. B. 595, 609; *Dunkirk Colliery Co.* v. *Lever* (1878), 9 Ch. D. 20, C. A.; and see *Brady* v. *Oastler* (1864), 3 H. & C. 112, and title SALE OF GOODS. As to action for conversion, see p. 344, *post*.

(*o*) *Tredegar Iron and Coal Co.* v. *Gielgud*, *supra*.

(*p*) *Stroud* v. *Austin & Co.* (1883), Cab. & El. 119; and see *France* v. *Gaudet* (1871), L. R. 6 Q. B. 199, which was an action for conversion, but the same principle was applied.

(*q*) *Stroud* v. *Austin & Co.*, *supra*; *France* v. *Gaudet*, *supra*.

SECT. 2. In Contract.

If in the absence of a market for the particular kind of goods purchased, which the seller has failed to deliver, the buyer, in order to avert greater loss, buys goods in substitution, which are the nearest thereto in price and quality, he is entitled to damages in respect of his additional expense in doing so (*r*).

Delay in delivery.

**611.** If the seller delays delivery beyond the time fixed for it, or if no time is fixed beyond a reasonable time, the rule is similar; the buyer is entitled to the difference between the value of the goods when actually delivered and the value which they would have had if delivered at the proper time (*s*), and it would seem that loss of profit on resale may be taken into account as naturally flowing from the breach, if the goods are such as are ordinarily purchased for resale (*t*). Where the seller delays delivery of a chattel intended by the buyer for use in his own business, the loss of its value to the buyer may be estimated by calculating the profits which might have been earned by the chattel during the period of delay (*a*).

Where the buyer postpones delivery at the seller's request and the seller fails to deliver at the later date agreed upon, the measure of damages is the difference between the contract price and the market price at such later date, although the price was then greater than at the date originally fixed for delivery (*b*).

When price has been paid.

**612.** In the cases thus far considered the price of the goods had not been paid when the failure to deliver occurred (*c*). When goods are paid for at the time of the purchase and the seller fails to deliver them, the measure of damages is the value of the goods at the time of the trial (*d*).

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(*r*) *Hinde* v. *Liddell* (1875), L. R. 10 Q. B. 265.

(*s*) *Borries* v. *Hutchinson* (1865), 18 C. B. (N. S.) 445.

(*t*) *Ibid.* In this case the defendant knew that the plaintiff was buying in order to sell to a continental purchaser, though he did know who was the purchaser on the terms of the contract. The case may therefore be regarded as one in which the defendant had notice of special circumstances.

(*a*) *Fletcher* v. *Tayleur* (1855), 17 C. B. 21.

(*b*) *Ogle* v. *Vane* (*Earl*) (1868), L. R. 3 Q. B. 272, Ex. Ch.

(*c*) In the case of *Startup* v. *Costazzi* (1835), 2 Cr. M. & R. 165, the price had been paid at the time of the purchase, but the purchase-money with interest had been returned to the buyer after breach; and in *Valpy* v. *Oakley* (1851), 16 Q. B. 941, payment had been made by bill, but the bill had been dishonoured before the date for delivery.

(*d*) *Elliot* v. *Hughes* (1863), 3 F. & F. 387. According to the head-note in this report the damages awarded were "the highest price attained up to the date of trial." The value of goods of the same kind and quality as those purchased had in fact continuously risen up to the date of trial, but the judgment shows that it was the market price on the day of trial which afforded the measure of damages, and the circumstance that such price was the highest which had been reached since the breach was not material. Compare the rule as to damages for failure to replace stock (see p. 333, *ante*), in which case it is now clear that the amount to be awarded is the market price at the day of trial. See also *Robertson* v. *Dumaresq* (1864), 10 L. T. 110, P. C., where the plaintiff was entitled under statute to a grant of land in a colony, and the grant was refused, and the plaintiff, proceeding by petition of right, was awarded as compensation the value at the date of trial of land situated in the part of the colony in which like grants were made. In this case the plaintiff, having rendered services which entitled him to a grant of land, was in the position of a

Refusal to accept.

**613.** Where after a sale of goods the buyer refuses to accept the goods, if the property in them has passed to the buyer, the seller may recover the agreed price notwithstanding that there has been no delivery (*e*). The seller may also at his option sue for breach of the contract, in which case the measure of damages is the difference between the contract price and the market price at the date when the goods ought to have been accepted (*f*), and if the property has not passed to the buyer, this is the only remedy of the seller. If there is no market for the goods the seller is entitled to recover the full amount of damage actually sustained (*g*), or in other words such an amount as would place him in the same position as if delivery had been accepted (*h*).

Renunciation.

**614.** Where the buyer renounces his contract the seller need not wait until the time for delivery or complete delivery has arrived, but may sue at once (*i*). If he does so the damages must still be assessed with reference to the date when delivery should have been accepted, even though that date has not arrived when the trial takes place (*k*).

Where the seller has delayed delivery at the request of the buyer, and after such delay the buyer refuses to accept the goods, the seller is entitled to have damages assessed with reference to the market price at a reasonable time after the request to withhold delivery (*l*).

Reducing loss

**615.** The seller is bound in all cases to take any reasonable steps which are open to him to reduce his loss (*m*), and if it is shown that upon the occurrence of the breach the seller might have gone into the market and sold to better advantage than he could have done by waiting until the contract date for delivery, his damages may, it seems, be reduced accordingly (*n*).

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purchaser who, having paid the price of a chattel, has been refused delivery of it, and not in that of an ordinary purchaser of land (see p. 337, *post*). The court in awarding damages avowedly followed the analogy of actions for failure to redeliver stock. In this case again the land in the vicinity in which the grant should have been made had continuously risen in value, and Lord CHELMSFORD, L.C., in his judgment seems to assert that the claimant was entitled to the "highest value of the land"; but the actual decision was that he was entitled to the value at the date of trial. Where the buyer has suffered no loss by the seller's failure to deliver, he is of course entitled only to nominal damages (*Griffiths* v. *Perry* (1859), 1 E. & E. 680).

(*e*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 49.

(*f*) *Ibid.*, s. 50; *Maclean* v. *Dunn* (1828), 4 Bing. 722; *Boorman* v. *Nash* (1829), 9 B. & C. 145.

(*g*) *Dunkirk Colliery Co.* v. *Lever* (1879), 41 L. T. 633, C. A.

(*h*) *Cort* v. *Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.* (1851), 20 L. J. (Q. B.) 460.

(*i*) *Ibid.*

(*k*) *Frost* v. *Knight* (1872), L. R. 7 Exch. 111, 112, 114, Ex. Ch.; *Braithwaite* v. *Foreign Hardwood Co.*, [1905] 2 K. B. 543, C. A.

(*l*) *Hickman* v. *Haynes* (1875), L. R. 10 C. P. 598.

(*m*) *Frost* v. *Knight*, *supra*; *Dunkirk Colliery Co.* v. *Lever*, *supra*.

(*n*) *Wilson* v. *Hicks* (1857), 26 L. J. (EX.) 242; *Nickoll and Knight* v. *Ashton, Edridge & Co.*, [1901] 2 K. B. 126, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 138; *Roth & Co.* v. *Taysen, Townsend & Co.* (1896), 1 Com. Cas. 306. But on the other hand it has been held that if the plaintiff so going into the market

SECT. 2. In Contract.

Goods returned.

**616**. Where goods have been returned because they are not in accordance with a condition as to quality and the price has been paid the purchaser may recover the price with expenses incidental to the receipt and return of the goods (*o*); if the price has not been paid the damages are only nominal.

When the goods have not been returned the measure of damages is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty (*p*).

Breach of warranty.

**617**. The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining a further action for the same breach of warranty if he has incurred further damage. The damages recoverable are, however, limited to such as he was unable to set up and could not have recovered in the previous action (*q*).

The value to the buyer may be estimated at the difference between the price which he could actually obtain on sale of the inferior goods and the price which he could have obtained if they had answered to warranty (*r*). Where the goods have been resold by the buyer before he discovered the breach of warranty, the price at which he so resold them may be shown in evidence for the purpose of assisting the jury in estimating what the goods would have been worth if they had been equal to warranty (*s*).

Commission agent.

A commission agent is not in the same position as a seller selling with a warranty, and if he consigns goods to his principal which are not of the description ordered the measure of damages is not the difference in value between the goods ordered and those delivered, but the loss actually sustained by the principal (*t*).

Implied warranty.

**618**. There is an implied warranty that a chattel sold is reasonably fit (*u*) for the purpose for which it is obviously intended to be used,

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before the contract date for delivery should sell less advantageously than he might have done if he had waited, he would do so at his own risk (*Brown* v. *Muller* (1872), L. R. 7 Exch. 319, 322; and see also *Roper* v. *Johnson* (1873), L. R. 8 C. P. 167). Where there is no difference between the contract price and the market price as to date when delivery should have been accepted, or if the difference has been to the benefit of the seller, only nominal damages can be recovered (*Valpy* v. *Oakley* (1851), 16 Q. B. 941; *Griffiths* v. *Perry* (1859), 1 E. & E. 680).

(*o*) *Caswell* v. *Coare* (1809), 1 Taunt. 566; *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438.

(*p*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53 (2).

(*q*) *Ibid.*, s. 53 (4); *Mondel* v. *Steel* (1841), 8 M. & W. 858; *Rigge* v. *Burbidge* (1846), 15 M. & W. 598. The buyer is never obliged to set up the breach of warranty in diminution or extinction of the price. Before the Statutes of Set-off he could not have done so. Since those statutes he has an option; if sued he may pay the full price and bring a separate action for the breach of warranty (*Davis* v. *Hedges* (1871), L. R. 6 Q. B. 687).

(*r*) *Jones* v. *Just* (1868), L. R. 3 Q. B. 197; *Curtis* v. *Hannay* (1800), 3 Esp. 82; *Loder* v. *Kekulé* (1857), 3 C. B. (N. S.) 128.

(*s*) *Clare* v. *Maynard* (1837), 6 Ad. & El. 519, 523, n.

(*t*) *Cassaboglou* v. *Gibbs* (1883), 11 Q. B. D. 797, C. A.; *Chr. Salvesen & Co.* v. *Rederi Aktiebolaget Nordstjernan*, [1905] A. C. 302.

(*u*) As to the meaning of "reasonably fit," see *Strongitharm* v. *North Lonsdale Iron and Steel Co., Ltd.* (1905), 21 T. L. R. 357, C. A.

and in such cases, without resort to the doctrine of special circumstances within the contemplation of the parties, the seller is liable for all consequences which directly follow from the unfitness of the chattel (*a*).

Resale.

**619.** Where goods commonly intended for resale are sold with a warranty it is to be anticipated that the buyer will resell with the same warranty, and any damages which the buyer has become liable to pay to his sub-purchasers through breach of his warranty to them may be recovered by the buyer from the seller as damages naturally flowing from the wrongful act of the latter (*b*).

Sale of land.

**620.** When upon a contract for the sale of land the purchaser refuses to complete, the measure of damages is the injury sustained

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(*a*) *Jackson* v. *Watson & Sons*, [1909] 2 K. B. 193, C. A., where there was an implied warranty that certain tinned salmon was fit for food, and the plaintiff's wife partook of it and died from its effect, and it was held that the plaintiff was entitled to recover damages for the loss of his wife's services (the death of the wife not being an essential part of the cause of action) as the natural and probable cause of the breach of warranty; *Holden* v. *Bostock & Co.* (1902), 18 T. L. R. 317, C. A., where brewing sugar containing a poisonous substance was sold to brewers, and the latter were held entitled to recover the cost of making beer in substitution for that spoiled, the value of the stock spoiled at the ordinary market price, and the cost of advertising that they had changed their brewing materials; *Bostock & Co., Ltd.* v. *Nicholson & Sons, Ltd.*, [1904] 1 K. B. 725, where the defendants in their turn sued the manufacturers who had supplied them with the materials from which the brewing sugar was composed and were held entitled to recover the price of such materials, the value of their goods which had been spoilt thereby, but not for loss of business reputation, or for the damages which had been recovered from them by the brewers (see as to this note (*b*), *infra*); *Wren* v. *Holt*, [1903] 1 K. B. 610, C. A., where the plaintiff was made ill by arsenic contained in beer bought from the defendant, a publican; *Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K. B. 155, C. A. (goods dangerous to the knowledge of the seller, no warning given to the buyer); *Preist* v. *Last*, [1903] 2 K. B. 148, C. A. (injury caused by bursting of indiarubber hot-water bottle); *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K. B. 608, C. A. (typhoid fever germs in milk); *Smith* v. *Green* (1875), 1 C. P. D. 92, 96 (cows warranted free from disease, in fact suffering from foot and mouth disease; damages recovered for loss of other cows which were infected; there was a special finding that the defendant knew that the cows would be placed amongst other cows, but this seems to have been unnecessary; compare *Ward* v. *Hobbs* (1878), 4 App. Cas. 13, where there was an express refusal to warrant swine as free from disease, and the swine were in fact diseased and infected other swine, and it was held that damages for the loss of the latter could not be recovered); *Borradaile* v. *Brunton* (1818), 8 Taunt. 535 (breaking of unfit chain, damages for loss of anchor held thereby); *Randall* v. *Newson* (1877), 2 Q. B. D. 102, C. A. (breaking a carriage pole, damages for injury to horses); *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640, C. A. (defective chain injuring plaintiff's workman who recovered damages from plaintiff); *Smith* v. *Johnson* (1899), 15 T. L. R. 179 (wall built with defective lime condemned by local authority; damages against vendor of lime for cost of pulling down and rebuilding, and for loss of ground-rent during time lost). But see *Fitzgerald* v. *Leonard* (1893), 32 L. R. Ir. 675. See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (1), (2).

(*b*) *Randall* v. *Roper* (1858), E. B. & E. 84; *Hammond & Co.* v. *Bussey* (1887), 20 Q. B. D. 79, C. A. In *Bostock & Co., Ltd.* v. *Nicholson & Sons, Ltd.*, *supra*, it was not the article which the defendants had supplied to the plaintiffs which the latter had in turn supplied to the brewers, but a new substance manufactured by means of that article; hence in that case the warranty to the sub-purchasers was not the same warranty as that of the plaintiffs to the defendants.

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by the vendor (*c*), and if the vendor has resold the land at a lower price, the difference in price as well as the expenses occasioned by the resale may be recovered as damages naturally resulting from the breach (*d*).

Where upon a contract for the sale of land the vendor fails to convey through defect of title, the vendee is entitled to the return of the deposit with interest, together with expenses which have been incurred in investigation of title (*e*).

Such damages are commonly all that naturally result from the breach, for a contract for the sale of land is made subject to the implied condition that the vendor is able to make out a good title. If the purchaser has incurred expenses in raising the purchase-money, or in preparing the conveyance, or in surveying the estate (*f*), or has entered into contracts for the resale of the property (*g*) before he has ascertained whether the vendor can make out a good title, damages for such expenses or for loss of profit upon such resale are not the natural consequences of the breach, and cannot be recovered in an action in respect of it. If, however, the defendant knew that he had no title and was guilty of fraud, such damages may be recovered in an action for fraud (*h*).

Carriers.

**621.** The measure of damages in actions against carriers for the loss of goods, or for delay in delivery, or for negligence, is dealt with elsewhere (*i*).

Work and labour.

**622.** Where a manufacturer is employed to execute work upon a chattel and fails to complete such work within the time limited by the contract, or if no time is limited thereby, within a reasonable time, the plaintiff is entitled to recover the loss which he has directly sustained by the delay, together with any expense he has reasonably incurred in minimising such loss. Thus, where delay occurs in executing repairs to a ship, the owners are entitled to the net profits which the ship "might have been reasonably expected to earn" during the period of delay (*k*). Similarly where delay occurs through repairs having been improperly executed to a ship, the owner may recover the loss sustained by him by the detention of the vessel whilst such repairs are made good (*l*). And where delay

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(*c*) *Laird* v. *Pim* (1841), 7 M. & W. 474.

(*d*) *Noble* v. *Edwardes* (1877), 5 Ch. D. 378, C. A.; and see title SALE OF LAND.

(*e*) *De Bernales* v. *Wood* (1812), 3 Camp. 258; *Walker* v. *Moore* (1829), 10 B. & C. 416; *Hodges* v. *Litchfield* (*Earl*) (1835), 1 Bing. (N. C.) 492; *Orme* v. *Broughton* (1834), 10 Bing. 533.

(*f*) *Hodges* v. *Litchfield* (*Earl*), *supra*; *Hanslip* v. *Padwick* (1850), 5 Exch. 615; *Jarmain* v. *Egelston* (1831), 5 C. & P. 172.

(*g*) *Flureau* v. *Thornhill* (1776), 2 Wm. Bl. 1078; *Bain* v. *Fothergill* (1874), L. R. 7 H. L. 158; *Gas Light and Coke Co.* v. *Towse* (1887), 35 Ch. D. 519; *Rowe* v. *London School Board* (1887), 36 Ch. D. 619; *Morgan* v. *Russell & Sons*, [1909] 1 K. B. 357. See title SALE OF LAND. The rule as to the granting of leaseholds is different; see *Robinson* v. *Harman* (1848), 1 Exch. 850; and title LANDLORD AND TENANT.

(*h*) *Ibid.*

(*i*) See title CARRIERS, Vol. IV., pp. 17 *et seq.*

(*k*) *Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.* (1868), 4 Ch. App. 112, 117; *Waters* v. *Towers* (1853), 8 Exch. 401.

(*l*) *Wilson* v. *General Iron Screw Collier Co.* (1877), 47 L. J. (Q. B.) 239,

occurs in executing repairs to a threshing machine, damages may be recovered for the deterioration of the plaintiff's wheat by rain, and for the expense of stacking the wheat and drying it (*m*).

Breach of covenant to build.

**623.** Where there has been a breach of a covenant to build a wall, but it appears that, by reason of particular circumstances, the value of the plaintiff's land has not been decreased by the non-erection of the wall to anything like the cost of building the wall, the true measure of damages is not the cost of building the wall, but the pecuniary amount of the difference between the position of the plaintiff upon the breach and what it would have been if the contract had been performed (*n*).

Wrongful dismissal.

**624.** In actions for wrongful dismissal the plaintiff may recover the wages for the whole unexpired period of service, including wages due at the date of dismissal (*o*); but if he has obtained or might have obtained other occupation at an equal salary, this is to be taken into account (*p*). He cannot recover commission on business that he might have received during the employment, if that business depended on the will of his master (*q*).

In the case of menial servants, there is a customary right for the master to terminate the engagement by giving a calendar month's notice or paying a calendar month's wages (*r*), and in an action for wrongful dismissal the damages are fixed at one month's wages (*s*).

Covenant to repair.

**625.** In an action brought by a landlord during the continuance of a lease for breach of covenant to repair, the measure of damages is the extent to which the marketable value of the reversion is injured, and if the lease has a very long time to run such injury is very slight (*a*). When the action is brought at the end of the term the

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where the amount awarded for the period of delay was based on the average earnings of the vessel. And see *Waters* v. *Towers* (1853), 8 Exch. 401, where it was held that whilst damages could not be recovered in respect of loss of profit on specific contracts entered into by the plaintiffs, such contracts might be considered in arriving at the amount of profit which might reasonably have been expected to be earned but for the delay.

(*m*) *Smeed* v. *Foord* (1859), 1 E. & E. 602. But the plaintiff could not recover in respect of the fall in the market price of wheat during the period of delay (*ibid.*, *per* Lord CAMPBELL, at p. 608; *Hadley* v. *Baxendale* (1854), 9 Exch. 341).

(*n*) *Wigsell* v. *School for Indigent Blind* (1882), 8 Q. B. D. 357.

(*o*) *Goodman* v. *Pocock* (1850), 15 Q. B. 576; *Hochster* v. *De la Tour* (1853), 2 E. & B. 678; *Frost* v. *Knight* (1872), L. R. 7 Exch. 111, Ex. Ch.; *Brace* v. *Calder*, [1895] 2 Q. B. 253, C. A.

(*p*) *Reid* v. *Explosives Co.* (1887), 19 Q. B. D. 264, C. A.; *Brace* v. *Calder*, *supra*. As to the effect of unfounded charges of misconduct, see note (*l*), on p. 307, *ante*; and see, generally, title MASTER AND SERVANT.

(*q*) *Re English and Scottish Marine Insurance Co.*, *Ex parte Maclure* (1870), 5 Ch. App. 737; *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544, C. A.

(*r*) *Fawcett* v. *Cash* (1834), 5 B. & Ad. 904.

(*s*) *Fewings* v. *Tisdal* (1847), 1 Exch. 295; *French* v. *Brookes* (1830), 6 Bing. 354. Nothing can be recovered in respect of loss of board during the month; see *Winstone* v. *Linn* (1823), 1 B. & C. 460, *per* HOLROYD, J., at p. 469; *Gordon* v. *Potter* (1859), 1 F. & F. 644. Se also title CUSTOM AND USAGES, p. 288, *ante*.

(*a*) *Mills* v. *East London Union* (1872), L. R. 8 C. P. 79; *Williams* v. *Williams* (1874), L. R. 9 C. P. 659; *Joyner* v. *Weeks*, [1891] 2 Q. B. 31; *Henderson* v. *Thorn*, [1893] 2 Q. B. 164.

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measure of damages is such an amount as will suffice to put the premises in such repair as is required by the covenant (*b*).

## SECT. 3.—*In Tort.*

Damages recoverable in tort.

**626.** In actions of tort as in actions of contract the principle applies that such damages only are recoverable as are the natural and probable result of the acts complained of (*c*).

Rules for the computation of damages in accordance with this principle have been laid down in actions of trespass to land or goods, in actions of conversion, and in some other cases (*d*). In cases of injury to property by reason of negligence, or nuisance, or misrepresentation, although damages may usually be ascertained with approximate precision by reference to the general principle, there are few rules to aid the court in the application of that principle (*e*).

In actions of defamation, malicious prosecution, false imprisonment, assault, and other injuries to the person or character, although the rule remains that only such damages are recoverable as naturally flow from the wrongful act, there is no method of measuring the money value of such injuries, and the only limit to the damages to be awarded is that they must be reasonable in amount (*f*). And not only in actions of the class just referred to, but in all actions of tort, whether to the property, or the person, or the reputation, damages may be indefinitely enhanced by reason of the malicious, or insulting, or oppressive conduct of the defendant (*g*). When the gist of the action is malice on the part of the defendant, evidence may be given of actual or express malice upon his part for the purpose of aggravating the damages (*h*).

Trespass to land.

**627.** Where by the trespass of the defendant the plaintiff has been wholly deprived of his land, he is to be compensated according to the value of his interest (*a*), and if he is a freeholder

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(*b*) *Woodhouse* v. *Walker* (1880), 5 Q. B. D. 404, 408; *Whitham* v. *Kershaw* (1886), 16 Q. B. D. 613, 616, C. A.; *Joyner* v. *Weeks*, [1891], 2 Q. B. 31; and see title LANDLORD AND TENANT. As to breach of promise of marriage, see p. 333, *ante*.

(*c*) *The Argentino* (1888), 13 P. D. 191, C. A., *per* Lord ESHER, M.R., at p. 199. In torts "English law only permits the recovery of such damages as are produced immediately and naturally by the act complained of" (*ibid.*, *per* BOWEN, L.J., at p. 200). According to BOWEN, L.J., the second part of the rule in *Hadley* v. *Baxendale* (1854), 9 Exch. 341, does not apply to torts; compare p. 317, *ante*.

(*d*) See *infra*.

(*e*) See p. 331, *ante*.

(*f*) See p. 306, *ante*.

(*g*) *Sears* v. *Lyons* (1818), 2 Stark 317; *Pearson* v. *Lemaitre* (1843), 5 Man. & G. 700; *Warwick* v. *Foulkes* (1844), 12 M. & W. 507; *Merest* v. *Harvey* (1814), 5 Taunt. 442; *Bayliss* v. *Fisher* (1830), 7 Bing. 153; *Davis* v. *Bromley Urban District Council* (1903), 67 J. P. 275, C. A.; and see *Rileys* v. *Halifax Corporation* (1907), 97 L. T. 278; compare p. 307, *ante*. *Quære*, how far this is the case in conversion or detinue. Damages may be awarded in respect of malice or insult in the taking of goods, but this is recoverable in trespass. In conversion and detinue the gist of the action is not the taking but the retaining, and it seems doubtful whether damages have ever been awarded for malicious or oppressive conduct in retaining.

(*h*) See p. 346, *post*.

(*a*) *Evelyn* v. *Raddish* (1817), Holt (N. P.), 543; *Johnstone* v. *Hall* (1856), 2 K. & J. 414.

entitled to possession, the damages will be the total selling value of the land (*b*).

In respect of injuries done to the land by trespass the measure of damages is the depreciation in the selling value of the land (*c*), or in the selling value of the plaintiff's interest in it (*d*), and not the amount required to put the premises in repair. Where the injury is caused by a nuisance, however, damages cannot be given in respect of the depreciation of the selling value of the land, but only in respect of the loss or inconvenience he has actually suffered, for the continuance of the nuisance constitutes a fresh cause of action for which damages may be recovered (*e*).

A reversioner is only entitled to recover damages against a trespasser when his reversionary right has been injured, and this is only the case where the injury is permanent in its character (*f*).

Where a trespass consists of a wrongful and unauthorised user of the plaintiff's land, the measure of damages is not the depreciation in the value of the plaintiff's land, or the amount required to repair the injury which has been suffered, but such reasonable payment in the nature of rent as would have been required for a licence to make such use of the plaintiff's land during the period whilst it was so used (*g*).

Aggravation of damages.

**628.** The rule that only such damages are recoverable as are the natural and probable result of the wrongful act is somewhat obscured in its application to actions of trespass by the fact that the amount of damages in such an action may always be indefinitely enhanced by evidence of malicious motive or violent and insulting conduct (*h*) on the part of the defendant. Evidence of injuries which cannot be regarded as the natural result of the wrongful act may be given in proof of the malice or violence of the defendant (*i*), and although damages cannot be given in

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(*b*) *McArthur & Co.* v. *Cornwall*, [1892] A. C. 75.

(*c*) *Jones* v. *Gooday* (1841), 8 M. & W. 146; *Hosking* v. *Phillips* (1848), 3 Exch. 168; *Dodd* v. *Holme* (1834), 1 Ad. & El. 493; *Hide* v. *Thornborough* (1846), 2 Car. & Kir. 250.

(*d*) *Jefferson* v. *Jefferson* (1683), 3 Lev. 130; *Jesser* v. *Gifford* (1768), 4 Burr. 2141; *Evelyn* v. *Raddish* (1817), Holt (N. P.), 543; *Johnstone* v. *Hall* (1856), 2 K. & J. 414.

(*e*) *Battishill* v. *Reed* (1856), 18 C. B. 696.

(*f*) *Baxter* v. *Taylor* (1832), 4 B. & Ad. 72; *Simpson* v. *Savage* (1856), 1 C. B. (N. S.) 347; *Mumford* v. *Oxford, Worcester, and Wolverhampton Rail. Co.* (1856), 1 H. & N. 34; *Twyman* v. *Knowles* (1853), 13 C. B. 222; all approved in *Rust* v. *Victoria Graving Dock Co. and London and St. Katharine Dock Co.* (1887), 36 Ch. D. 113, C. A., *per* LINDLEY, L.J., at p. 135; and compare *Tancred* v. *Allgood* (1859), 4 H. & N. 438. But a reversioner may recover damages against his own lessee for trespass in the nature of waste, although the injury is not of a permanent character, if it tends to weaken the evidence of his title (*Young* v. *Spencer* (1829), 10 B. & C. 145).

(*g*) *Holmes* v. *Wilson* (1839), 10 Ad. & El. 503, where the defendant used the plaintiff's land for tipping spoil; *Martin* v. *Porter* (1839), 5 M. & W. 352, where the defendant carried minerals along the plaintiff's land without his permission; and see *Phillips* v. *Homfray* (1871), 6 Ch. App. 770; *Jegon* v. *Vivian* (1871), 6 Ch. App. 742.

(*h*) *Clark* v. *Newsam* (1847), 1 Exch. 131; *Merest* v. *Harvey* (1814), 5 Taunt. 442.

(*i*) *Huxley* v. *Berg* (1815), 1 Stark. 98, where the action was for trespass in

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respect of those injuries as such, the jury may take them into account in awarding damages for the trespass (*j*).

Apart from any question of aggravation by reason of the conduct of the defendant damages which naturally flow from the trespass complained of may be recovered, notwithstanding that they might have formed the subject-matter of a separate action. Thus, where the defendant's diseased cattle trespass on the plaintiff's land, damages may be recovered in an action for such trespass in respect of injury to the plaintiff's cattle by reason of infection (*k*).

But one trespass is not the natural result of another, and if the defendant after breaking and entering the plaintiff's land has then committed injury to his goods, this affords a separate ground of action and should be alleged as such (*l*). And where the property of the owner of a building estate is injured by a flood which is due to the wrongful act of the defendant, no damages can be recovered in respect of the prejudice against the locality by reason of the flood and the consequent reduction in rental, for such prejudice is not the natural result of the defendant's wrongful act (*m*).

Trespass to goods.

**629.** In actions of trespass to goods (apart from punitive damages which may be recovered for the trespass in respect of the manner of taking (*n*)) the measure of damages is the value of the goods if they have been destroyed, or the extent to which they have been depreciated if they still exist (*o*).

Where goods have been seized by an officer of the law in a place beyond the jurisdiction of the court, the measure of damages is the whole value of the goods seized, and not merely the amount of injury sustained (*p*). Where goods have been wrongfully seized by an officer of the law the plaintiff may recover as special damages any money which he has necessarily paid in order to recover them (*q*).

Wrongful distress.

**630.** In actions for wrongful distress for rent, where the distress was void *ab initio*, the measure of damages is the actual value of the goods seized without deduction of the rent due (*r*). And this is the case even though the goods seized are not the absolute

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breaking into the plaintiff's house, and evidence was given that the plaintiff's wife was so frightened that she became ill and died. *Quære*, however, whether illness resulting from fright might not now be regarded as the natural consequence of the wrongful act, see p. 321, *ante*); *Bracegirdle* v. *Orford* (1813), 2 M. & S. 77, where the action was for trespass or breaking into the plaintiff's house and searching therein for stolen property, and evidence was given that the plaintiff was injured in her credit and believed by her neighbours to be a receiver of stolen property.

(*j*) See *Davis* v. *Bromley Urban District Council* (1903), 67 J. P. 275, C. A.

(*k*) *Anderson* v. *Buckton* (1719), 1 Stra. 192.

(*l*) *Ibid.*; *Bennett* v. *Allcott* (1787), 2 Term Rep. 166; *Pritchard* v. *Long* (1842), 9 M. & W. 666.

(*m*) *Rust* v. *Victoria Graving Dock Co. and London and St. Katharine Dock Co.* (1887), 36 Ch. D. 113, C. A.

(*n*) See p. 325, *ante*.

(*o*) As to the mode of estimating the value of the goods, the same principles apply as in the case of trover, see p. 344, *post*.

(*p*) *Sowell* v. *Champion* (1837), 6 Ad. & El. 407.

(*q*) *Keene* v. *Dilke* (1849), 4 Exch. 388; and see title TRESPASS.

(*r*) *Attack* v. *Bramwell* (1863), 3 B. & S. 520.

property of the plaintiff, but are pledged with him as a pawnbroker (*s*). But where distress is made, *inter alia*, of goods not distrainable by law, the landlord is a trespasser *ab initio* only as to such goods (*t*).

In actions for excessive distress the plaintiff is entitled to damages for the loss he has sustained in having more goods than was necessary taken from him, and also for the inconvenience which he has suffered (*a*).

In actions for irregular distress the plaintiff can only recover in respect of actual damage suffered. If no damage is proved he is not entitled to nominal damages (*b*).

Special damage.

**631.** In all cases of trespass to goods special damages may be recovered if claimed, and if they flow directly from the wrongful acts (*c*), but the wrongdoer is not liable in respect of loss of credit resulting from the wrongful seizure (*d*) or for other indirect consequences (*e*).

Underground trespass.

**632.** Where the defendant has trespassed on the plaintiff's underground property and carried away his minerals, the measure of damages varies according to the circumstances under which the trespass was committed by the wrongdoer.

If the defendant was guilty of fraud or negligence the plaintiff is entitled to recover the value of the minerals at the time they first became chattels—that is, their value at the pit's mouth—allowing for the cost of raising them to the surface (*f*). If the defendant acted honestly and without negligence the plaintiff is only entitled to the value of the minerals at the pit's mouth after allowing for the cost of getting them as well as that of raising them to the surface (*g*).

Damages may also be recovered in respect of any incidental trespass committed by the defendant in the course of obtaining the plaintiff's minerals, as for example by disturbance of the surface of the land (*h*), and if by reason of the method adopted by the defendant of removing the minerals the remaining minerals have been

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(*s*) *Swire* v. *Leach* (1865), 18 C. B. (N. S.) 479.

(*t*) *Harvey* v. *Pocock* (1843), 11 M. & W. 740.

(*a*) *Woodcroft* v. *Thompson* (1682), 3 Lev. 48; *Lynne* v. *Moody* (1729), 2 Stra. 851. If no actual damage can be proved, the plaintiff must still be awarded damages for the inconvenience caused, and such damages may be substantial (*Chandler* v. *Doulton* (1865), 3 H. & C. 553; and see title LANDLORD AND TENANT).

(*b*) *Rodgers* v. *Parker* (1856), 18 C. B. 112; *Lucas* v. *Tarleton* (1858), 3 H. & N. 116. See title LANDLORD AND TENANT.

(*c*) *Poynter* v. *Buckley* (1833), 5 C. & P. 512; *Ridgway* v. *Stafford* (*Lord*) (1851), 6 Exch. 404; *Roden* v. *Eyton* (1848), 6 C. B. 427.

(*d*) *Nicosia* v. *Vallone* (1877), 37 L. T. 106, P. C.

(*e*) *Walker* v. *Olding* (1862), 1 H. & C. 621; *Walshaw* v. *Brighouse Corporation*, [1899] 2 Q. B. 286, C. A.; and see title TRESPASS.

(*f*) *Martin* v. *Porter* (1839), 5 M. & W. 352; *Wild* v. *Holt* (1842), 9 M. & W. 672; *Morgan* v. *Powell* (1842), 3 Q. B. 278; and see title MINES, MINERALS AND QUARRIES.

(*g*) *Wood* v. *Morewood* (1841), 3 Q. B. 440, n.; *Re United Merthyr Collieries Co.* (1872), L. R. 15 Eq. 46; *Job* v. *Potton* (1875), L. R. 20 Eq. 84; *Ashton* v. *Stock* (1877), 6 Ch. D. 719. As to the measure of damages where no minerals are taken, see *Rileys* v. *Halifax Corporation* (1907), 97 L. T. 278.

(*h*) *Morgan* v. *Powell*, *supra*; *Martin* v. *Porter*, *supra*; *Wild* v. *Holt*, *supra*.

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depreciated in value, such depreciation is to be regarded as flowing naturally from the wrongful act (*i*).

Conversion.

**633.** In actions for conversion the measure of damages is ordinarily the value of the goods (*k*). This value is in most cases to be taken at the date of the conversion (*l*), but if the price of goods such as those which have been taken has risen, it seems that the value may be estimated as at the date of the trial (*m*).

Where goods have been converted at some place other than their destination, their value may be at the invoice price together with the freight paid (*n*), or at their selling price at the place of destination, less the freight (*o*).

The value of a chattel which was converted whilst in an unfinished state is estimated by ascertaining what would have been its value in a complete state at the place where it was converted and deducting the amount which it would have cost to complete it (*p*).

Where the plaintiff is a bailee and the defendant is a mere stranger, the measure of damages is the entire value of the goods, even though in the particular circumstances of the case the bailee would not be responsible to the bailor for the loss of the goods (*q*). Where the defendant is a bailor whose right of repossession has not accrued, the measure of damages is the plaintiff's interest in the goods (*r*).

Where the property in goods sold on credit has passed to a buyer but the goods are not delivered, and the seller converts them to his own use by reselling them, the measure of damages in an action by the first buyer against the seller is not the full value obtained for the goods on the resale, but only the difference between the contract price of the goods and the market price at the date of conversion (*s*). As against a wrongdoer other than the seller or

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(*i*) *Williams* v. *Raggett* (1877), 46 L. J. (CH.) 849.

(*k*) *Reid* v. *Fairbanks* (1853), 13 C. B. 692; and compare *Bavins* v. *London and South-Western Rail.*, [1900] 1 Q. B. 270.

(*l*) *Ibid.*; *Henderson* v. *Williams*, [1895] 1 Q. B. 521; compare *Stowe* v. *Benstead*, [1909] 2 K. B. 415.

(*m*) *Greening* v. *Wilkinson* (1825), 1 C. & P. 625 (referred to and followed in *Johnson* v. *Hook* (1883), 31 W. R. 812, and apparently overruling *Mercer* v. *Jones* (1813), 3 Camp. 477), where it was said that the jury might give the value at the date of the conversion "or at any subsequent time," and the value was estimated as at the date of the trial; but see *Reid* v. *Fairbanks*, *supra*, *per* MAULE, J., at p. 728.

(*n*) *Ewbank* v. *Nutting* (1849), 7 C. B. 797.

(*o*) *Morgan* v. *Powell* (1842), 3 Q. B. 278; *Burmah Trading Corporation, Ltd.* v. *Mirza Mahomed Ally Sherazee and the Burmah Co., Ltd.* (1878), L. R. 5 Ind. App. 130.

(*p*) *Reid* v. *Fairbanks*, *supra*.

(*q*) *Waters* v. *Monarch Life and Fire Insurance Co.* (1856), 25 L. J. (Q. B.) 102; *The Winkfield*, [1902] P. 42, C. A., overruling *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422.

(*r*) *Brierly* v. *Kendall* (1852), 17 Q. B. 937; *Toms* v. *Wilson* (1863), 4 B. & S. 455, Ex. Ch.; and compare *Johnson* v. *Stear* (1863), 15 C. B. (N. S.) 330.

(*s*) *Chinery* v. *Viall* (1860), 5 H. & N. 288. If, however, goods have been delivered to a buyer, and the unpaid seller seizes them and the buyer sues him in trespass, the latter is entitled to the full value of the goods without any deduction in respect of their price. The reason is said to be that notwith-

anyone claiming under him the buyer may recover the full value of the goods notwithstanding that they are not paid for (*t*).

Interest may be allowed in addition to the value of the goods at the time of the conversion if the jury think fit (*a*).

Where special damage beyond the value of the goods has been incurred, it may be recovered, if claimed, and if it was the natural and probable result of the wrongful act (*b*).

Detinue.

**634.** In actions of detinue the judgment is usually for the return of the chattel detained or its value, together with nominal damages for its detention, but where the chattel detained has declined in value, as in the case of railway scrip where the market has fallen, damages in respect of this diminished value may be given (*c*).

Replevin.

**635.** In replevin, inasmuch as the goods which have been seized are restored to the plaintiff under the terms of the replevin bond, the measure of damages is, as a rule, only the costs of the replevin bond. But if the plaintiff has suffered damage beyond such costs by reason of injury to the goods or in any other respect as a consequence of the defendant's act, such damage, if it would be recoverable in an action of trespass, and if it is specially claimed, may be recovered in the action of replevin (*d*). If it is not so claimed it is not recoverable at all (*e*).

Action against sheriff.

**636.** In actions against a sheriff by a creditor for breach of his duty in, for instance, executing a writ of *fi. fa.*, the measure of damages is the amount which could have been recovered if the sheriff had performed his duty (*f*).

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standing the retaking of the goods the buyer would still remain liable for the price (*Gillard* v. *Brittan* (1841), 8 M. & W. 575). This would now be the subject of a counterclaim by the seller against the buyer.

(*t*) *Turner* v. *Hardcastle* (1862), 11 C. B. (N. S.) 683.

(*a*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 29. Where the defendant declines to produce the chattel which he has converted it is to be presumed that it possesses the highest value of a chattel of its species (*Armory* v. *Delamirie* (1722), 1 Smith, L. C., 11th ed., 356; *Mortimer* v. *Cradock* (1843), 12 L. J. (C. P.) 166). In trover for title deeds the measure of damages is the full value of the estate to which they relate; but actions of this kind are treated as actions of detinue, and the judgment provides that upon the return of the deeds the damages are to be reduced to a nominal amount (*Loosemore* v. *Radford* (1842), 9 M. & W. 657, 659; *Coombe* v. *Sansom* (1822), 1 Dow. & Ry. (K. B.) 201). In trover the plaintiff can only recover the value of fixtures as chattels (*Clarke* v. *Holford* (1848), 2 Car. & Kir. 540; *Thurston* v. *Charles* (1905), 21 T. L. R. 659 (conversion of a letter and publication of contents); and see title TROVER AND CONVERSION).

(*b*) *Bodley* v. *Reynolds* (1846), 8 Q. B. 779 (conversion of tools of trade, damages awarded for plaintiff being prevented from working at his trade); *Davis* v. *Oswell* (1837), 7 C. & P. 804 (conversion of horse, damages awarded in respect of the hiring of other horses); and see *France* v. *Gaudet* (1871), L. R. 6 Q. B. 199, 205.

(*c*) *Williams* v. *Archer* (1847), 5 C. B. 318; *Serrao* v. *Noel* (1885), 15 Q. B. D. 549, C. A. But as to the time and manner in which the value should be estimated see p. 333, *ante*.

(*d*) *Gibbs* v. *Cruikshank* (1873), L. R. 8 C. P. 454; *Smith* v. *Enright*, [1893] W. N. 173. As to replevin generally, see title DISTRESS.

(*e*) *Gibbs* v. *Cruikshank*, *supra*.

(*f*) *Aireton* v. *Davis* (1833), 9 Bing. 740; *R.* v. *Essex* (*Sheriff*) (1836), 1 M. & W. 720; *Crowder* v. *Long* (1828), 8 B. & C. 598; *Heenan* v. *Evans* (1841),

SECT. 3. In Tort.

Action against solicitor.

**637.** In actions against a solicitor for negligence in the conduct of an action, the measure of damages is the amount which the plaintiff might have recovered in such action if the solicitor had exercised due diligence (*g*).

# Part V.—Pleading, Proof, and Assessment of Damages.

## SECT. 1.—*Pleading and Proof.*

Pleading damages.

**638.** General damage (*h*) need not be specially pleaded (*i*), but special damage (*k*) must be pleaded in order that the defendant may not be taken by surprise at the trial (*l*).

The plaintiff is at liberty to plead any matter in aggravation of damages as to which he may give evidence at the trial (*m*); but the defendant cannot plead any matter in mitigation of damages, unless it constitutes a defence (*n*).

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3 Man. & G. 398; *Augustien* v. *Challis* (1847), 1 Exch. 279; *Mullet* v. *Challis* (1851), 16 Q. B. 239; *Hobson* v. *Thellusson* (1867), 8 B. & S. 476. As to the necessity of proving special damage in actions against sheriffs, see p. 347, *post*. As to sheriffs generally, see title SHERIFFS AND BAILIFFS.

(*g*) *Lee* v. *Ayrton* (1792), Peake, 161; *Harrington* v. *Binns* (1863), 3 F. & F. 942; and see *Godefroy* v. *Jay* (1831), 7 Bing. 413.

(*h*) See p. 303, *ante*.

(*i*) *Boorman* v. *Nash* (1829), 9 B. & C. 145; *Smith* v. *Thomas* (1835), 2 Bing. (N. C.) 372. As to pleading generally, see title PLEADING.

(*k*) See p. 304, *ante*.

(*l*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A., *per* BOWEN, L.J., at p. 528; *Bodley* v. *Reynolds* (1846), 8 Q. B. 779; *Davis* v. *Oswell* (1837), 7 C. & P. 804; *Fleming* v. *Bank of New Zealand*, [1900] A. C. 577, P. C.; compare *Moon* v. *Raphael* (1835), 2 Bing. (N. C.) 310, *per* TINDAL, C.J., at p. 315; *Hartley* v. *Herring* (1799), 8 Term Rep. 130.

(*m*) *Millington* v. *Loring* (1880), 6 Q. B. D. 190, C. A.; *Appleby* v. *Franklin* (1885), 17 Q. B. D. 93; *Whitney* v. *Moignard* (1890), 24 Q. B. D. 630. As to pleading in libel and slander cases, see title LIBEL AND SLANDER.

(*n*) *Wood* v. *Durham* (*Earl*) (1888), 21 Q. B. D. 501. It is difficult to reconcile this case with those cited in note (*m*), *supra*. In *Wood* v. *Durham* (*Earl*), *supra*, MANISTY, J., says, at p. 505, that in *Millington* v. *Loring*, *supra*, the matters alleged constituted a separate cause of action, but in the latter case Lord SELBORNE, L.C., at p. 194, expressly based the decision on the ground that the words "material facts" (R. S. C., Ord. 19, r. 4) include any facts that the party pleading was entitled to prove at the trial; and BRETT, L.J., expressly says, at p. 193, that the facts alleged were not necessary to establish the cause of action. It is true that R. S. C., Ord. 19, r. 4, was altered at a date subsequent to *Millington* v. *Loring*, *supra*, by the addition of the words "contain only"; but this does not affect Lord SELBORNE'S judgment, and the decision was confirmed in *Whitney* v. *Moignard*, *supra*, after the alteration. Moreover, in *Scott* v. *Sampson* (1882), 8 Q. B. D. 491, the court, whilst deciding that evidence of certain matters going to damages only was properly rejected, added as a further ground that the fact that they had not been pleaded was sufficient to justify their rejection (see at pp. 495, 507). *Wood* v. *Cox* (1888), 4 T. L. R. 550, also supports this view. The only explanation of *Wood* v. *Durham* (*Earl*), *supra*, appears to be either that R. S. C., Ord. 21, r. 4, being a particular rule as to defences, overrides R. S. C., Ord. 19, r. 4, in cases within it, or that the matter there sought to be pleaded would not have been admissible in evidence at all at the trial. The former explanation is that on which the decision appears to be based, but it is

SECT. 1. Pleading and Proof.

Proof of damage.

When special damage is claimed it is necessary in the case of breach of contract to show that, before the contract was made, the party sought to be charged had notice of the particular circumstances, and that he accepted the contract with the special condition attached to it (*o*). In the case of tort (*p*), however, the doctrine that the defendant must have had notice at the time he committed his wrongful act cannot in its nature be applied (*q*), though he may be held liable for what he ought, by the exercise of his reason, to have apprehended would be the result of his acts (*r*).

Special damage.

**639.** Special damage must be proved before an action can be brought against a sheriff for breach of duty (*s*), by (*t*) or against (*u*) executors for breach of promise of marriage to or by the deceased, against the owner of the substratum for withdrawal of support to the surface (*a*), or, in some cases (*b*), for slander (*c*). In these cases the character of the acts themselves which produce the damage, and the circumstances in which these acts are done, regulate the degree of certainty and particularity with which the damage done ought

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respectfully submitted that it is unsatisfactory. The decision, but not the judgments, may possibly be justified on the latter ground. See further *Mangena* v. *Wright* (1909), 78 L. J. (Q. B.) 879. As to giving notice of matters on which a defendant in actions of libel or slander intends to rely in mitigation of damages, see R. S. C., Ord. 36, r. 37; and title LIBEL AND SLANDER.

(*o*) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; *Great Western Rail. Co.* v. *Redmayne* (1866), L. R. 1 C. P. 329; *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L. R. 3 C. P. 499, *per* WILLES, J., at p. 509; *Horne* v. *Midland Rail. Co.* (1873), L. R. 8 C. P. 131, Ex. Ch.; *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q. B. D. 670; *Grébert-Borgnis* v. *Nugent* (1885), 15 Q. B. D. 85, C. A., *per* BRETT, M.R., at p. 89; *Hammond & Co.* v. *Bussey* (1887), 20 Q. B. D. 79, C. A.; *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q. B. 413, C. A. On this point see further p. 313, *ante*.

(*p*) The division of damages into "general" and "special" damage has been said to be more appropriate in cases of tort than in cases of contract (*Ströms Bruks Actie Bolag* v. *Hutchinson* (*John and Peter*), [1905] A. C. 515, *per* Lord MACNAGHTEN, at pp. 525, 526). In the case of conversion, where the special damage is not part of the actual present value of the thing converted, it has been suggested that there must be notice of the special facts, either express or implied from the circumstances of the case (*France* v. *Gaudet* (1871), L. R. 6 Q. B. 199, *per* MELLOR, J., at p. 205, citing *Bodley* v. *Reynolds* (1846), 8 Q. B. 779; approved in *Wood* v. *Bell* (1856), 5 E. & B. 772).

(*q*) See *Sharp* v. *Powell* (1872), L. R. 7 C. P. 253; compare *Clark* v. *Chambers* (1878), 3 Q. B. D. 327; *McDowall* v. *Great Western Rail.*, [1902] 1 K. B. 618; [1903] 2 K. B. 331, C. A.

(*r*) See p. 317, *ante*.

(*s*) *Wylie* v. *Birch* (1843), 4 Q. B. 566, *per* Lord DENMAN, C.J., at p. 577 citing *Williams* v. *Mostyn* (1838), 4 M. & W. 145; *Stimson* v. *Farnham* (1871), L. R. 7 Q. B. 175. As to proofs generally, see title EVIDENCE, and as to proof in particular cases, see titles *passim*.

(*t*) *Chamberlain* v. *Williamson* (1814), 2 M. & S. 408.

(*u*) *Finlay* v. *Chirney* (1888), 20 Q. B. D. 495, C. A.

(*a*) *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127; *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe and Hampson, Ltd.*, [1908] A. C. 27.

(*b*) For slander, see *Thorley* v. *Kerry* (*Lord*) (1812), 4 Taunt. 355, *per* Lord MANSFIELD, C.J., at pp. 365, 366; *Foulger* v. *Newcomb* (1867), L. R. 2 Exch. 327; *Watkin* v. *Hall* (1868), L. R. 3 Q. B. 396, *per* BLACKBURN, J., at p. 399; Slander of Women Act, 1891 (54 & 55 Vict. c. 51); *Booth* v. *Arnold*, [1895] 1 Q. B. 571, C. A.; and title LIBEL AND SLANDER.

(*c*) *Dixon* v. *Smith* (1860), 5 H. & N. 450; *Miller* v. *David* (1874), L. R. 9 C. P. 118; *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797, C. A.; *Michael* v. *Spiers and Pond, Ltd.* (1909), 25 T. L. R. 740; see, generally, title LIBEL AND SLANDER.

SECT. 1. Pleading and Proof.

to be stated and proved (*d*); and as much certainty and particularity is to be insisted on, both in pleading and in proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done (*e*).

## SECT. 2.—*Assessment.*

### SUB-SECT. 1.—*In General.*

Who may assess.

**640.** In actions which proceed to trial in the ordinary course the assessment of damages is in the hands of the court, and when the action is tried by a jury such assessment is peculiarly the province of the jury (*f*) as being a question of fact which must be left to their decision (*g*).

In a case where liquidated damages (*h*) are recoverable the court is not called upon to assess the damages, but must find for the agreed sum (*i*). If, however, the plaintiff does not specifically claim the agreed sum, he will be deemed to be suing for unliquidated damages, and unless he gets leave to amend will only be entitled to recover an amount equivalent to the loss sustained (*k*).

Questions of law.

Questions of law arising as to the assessment of damages are for the judge alone (*l*), and it is the duty of a judge to direct a jury as to any rule of law which may affect their assessment and any rule as to the measure of damage to be awarded (*m*), since an omission so to do may render a new trial necessary (*n*).

Amendment of claim.

**641.** If the statement of claim claims a specific sum as damages and the jury assess the damages at more than that amount the court has power to amend the claim on application so to do, and after such amendment may enter judgment for the larger sum (*o*). A judgment for the larger sum without amendment is irregular (*p*).

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(*d*) Compare *Hartley* v. *Herring* (1799), 8 Term Rep. 130.

(*e*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A., *per* BOWEN, L.J., at p. 532.

(*f*) *Davis* v. *Shepstone* (1886), 11 App. Cas. 187, P. C. In practice a judge alone is often called on to assess damages even of an unliquidated kind, as, for instance, in non-jury actions in the King's Bench Division and in county courts. In the Chancery Division damages are assessed by a judge alone, in substitution for an injunction. See also title INJUNCTION.

(*g*) In accordance with the maxim *Ad quæstionem juris non respondent juratores; ad quæstionem facti non respondent judices*, see *R.* v. *St. Asaph (Dean)* (1783), 21 State Tr. 847, *per* Lord MANSFIELD, C.J., at p. 1039, and title JURIES.

(*h*) See p. 304, *ante*.

(*i*) *Lowe* v. *Peers* (1768), 4 Burr. 2225, 2229; *Farrant* v. *Olmins* (1820), 3 B. & Ald. 692; *Crisdee* v. *Bolton* (1827), 3 C. & P. 240.

(*k*) *Hurst* v. *Hurst* (1849), 4 Exch. 571.

(*l*) See, for instance, *Sainter* v. *Ferguson* (1849), 7 C. B. 716, 727, where the question was as to penalty or liquidated damages. Similarly the question of remoteness of damage must never be left to a jury (*Hobbs* v. *London and South Western Rail. Co.* (1875), L. R. 10 Q. B. 111, *per* BLACKBURN, J., at p. 122); and compare *Hammond & Co.* v. *Bussey* (1887), 20 Q. B. D. 79, C. A., *per* Lord ESHER, M.R., at p. 89).

(*m*) *Hadley* v. *Baxendale* (1854), 9 Exch. 341, *per* ALDERSON, B., at p. 354; *Blake* v. *Midland Rail. Co.* (1852), 18 Q. B. 93.

(*n*) *Ibid.*; especially when some substantial wrong or miscarriage has been occasioned thereby (R. S. C., Ord. 39, r. 6).

(*o*) *Chattell* v. *"Daily Mail" Publishing Co.* (1901), 18 T. L. R. 165, C. A.

(*p*) *Ibid.*; and see R. S. C., Ord. 28, r. 1; *Beckett* v. *Beckett and Jones*, [1901] P. 85.

SUB-SECT. 2.—*Assessment in Default of Appearance or Pleading.*

SECT. 2. Assessment.

Default of appearance.

**642.** Where a claim is for pecuniary damages and the defendant fails, or all the defendants, if more than one, fail to appear, the plaintiff is entitled to enter interlocutory judgment and to have the damages assessed on a writ of inquiry, but the court or a judge may order a statement of claim before assessment and may order the damages to be assessed in some other way (*a*) than by writ of inquiry (*b*). Where there are several defendants, and one or some, but not all, make default of appearance, the plaintiff may sign interlocutory judgment against the defendant or defendants who make default, but can only proceed to assessment in the above-mentioned manner before the trial of the action against the other defendants after an order to that effect, and if the action proceeds to trial may, by order on a summons, have his damages assessed in the same manner (*c*). A writ of inquiry is a writ directed to the sheriff of the county where the action would have been tried, reciting the interlocutory judgment and commanding him to summon a jury and assess the damages (*d*).

Reference.

**643.** In every action in the King's Bench Division in which it appears that the amount of damages sought to be recovered is substantially a matter of calculation the court may order such calculation to be referred to a master (*e*) or official referee (*f*), who certifies or reports upon the order the amount of damages found by him (*g*).

Default in pleading.

**644.** Exactly similar provisions apply where a defendant makes default in delivery of defence and the plaintiff is entitled to enter interlocutory judgment (*h*).

SUB-SECT. 3.—*Review of Assessment.*

Review on motion for new trial.

**645.** The assessment of damages may be reviewed in certain circumstances by the Court of Appeal on a motion for a new trial (*i*), and this right of review exists both where the action has proceeded to trial in the ordinary course and where damages have been assessed by an under-sheriff and a jury (*k*).

In reviewing the assessment of damages the discretion of the

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(*a*) As for instance before a master or official referee, *infra*.
(*b*) R. S. C., Ord. 13, r. 5.
(*c*) *Ibid.*, r. 6.
(*d*) Chitty's Archbold's Practice, 14th ed., p. 1331; and see titles JURIES; SHERIFFS AND BAILIFFS.
(*e*) R. S. C., Ord. 36, r. 57. For the practice on such a reference, see title PRACTICE AND PROCEDURE.
(*f*) *Ibid.*, r. 57A.
(*g*) *Ibid.*, r. 57.
(*h*) R. S. C., Ord. 27, rr. 4, 5.
(*i*) Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 1. As to procedure governing a new trial, see R. S. C., Ord. 39, and title PRACTICE AND PROCEDURE. In an action before an official referee the motion lies to a divisional court (*Gower* v. *Tobitt* (1891), 39 W. R. 193).
(*k*) *William Radam's Microbe Killer Co.* v. *Leather*, [1892] 1 Q. B. 85, C. A.

SECT. 2. Assessment.

Court of Appeal is governed by the general rule that some substantial wrong or miscarriage of justice has been occasioned by the verdict complained of (*l*).

Excessive damages.

**646.** Where the damages awarded by a jury are excessive a new trial will be granted if the Court of Appeal, without imputing perversity to the jury, comes to the conclusion, from the amount of damages and the other circumstances, that the jury must have taken into consideration matters which they ought not to have considered or have applied a wrong measure of damages (*m*). The mistake of the jury, caused either by misdirection as to the measure of damage (*n*), or by failing to consider right matters or considering wrong matters of damage (*o*), or by applying a wrong measure of damage although rightly directed as to the rule applicable (*p*), may be rectified by the Court of Appeal under this power (*q*).

Inadequate damages.

**647.** Under the same principles (*r*) the Court of Appeal can review the assessment of damages where they are so small as to show that the jury must have omitted to take into consideration some of the elements of damage (*s*) or have arrived at their verdict by a compromise (*t*), or that there has been a mistake of law on the part of the judge or a miscalculation of figures by the jury (*a*).

Reduction of damages.

**648.** The Court of Appeal cannot, without the consent of both plaintiff and defendant, reduce the damages to such a sum as the court would consider not excessive, in lieu of ordering a new trial (*b*).

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(*l*) R. S. C., Ord. 39, r. 6; *Bray* v. *Ford*, [1896] A. C. 44; and see *ibid.*, *per* Lord HERSCHELL, at p. 53.

(*m*) *Johnston* v. *Great Western Rail.*, [1904] 2 K. B. 250, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 258. This authority seems to have widened the rule laid down in *Praed* v. *Graham* (1889), 24 Q. B. D. 53, C. A., that the court must be of opinion that the amount is so large that no twelve men could reasonably have given it. The power of the Court of Appeal to review excessive damages seems to be of modern growth, and the law as laid down in *Johnston* v. *Great Western Rail.*, *supra*, has superseded the old cases where the court has interfered or refused to interfere with the verdict of the jury.

(*n*) *Bray* v. *Ford*, *supra*; *Hadley* v. *Baxendale* (1854), 9 Exch. 341; *Blake* v. *Midland Rail. Co.* (1852), 18 Q. B. 93; *Knight* v. *Egerton* (1852), 7 Exch. 407.

(*o*) *Rowley* v. *London and North Western Rail. Co.* (1873), L. R. 8 Exch. 221, Ex. Ch.

(*p*) *Anderson* v. *Calvert* (1908), 24 T. L. R. 399, C. A.

(*q*) See the cases cited in the three preceding notes.

(*r*) See the preceding paragraph.

(*s*) *Phillips* v. *London and South Western Rail. Co.* (1879), 5 Q. B. D. 78, C. A.; compare *Armytage* v. *Haley* (1843), 4 Q. B. 917.

(*t*) *Hall* v. *Poyser* (1845), 13 M. & W. 600; *Richards* v. *Rose* (1853), 9 Exch. 218; *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. 686, *per* MELLOR, J., at p. 695; *Falvey* v. *Stanford* (1874), L. R. 10 Q. B. 54.

(*a*) *Rendall* v. *Hayward* (1839), 5 Bing. (N. C.) 424; and see *Forsdike* v. *Stone* (1868), L. R. 3 C. P. 607.

(*b*) *Watt* v. *Watt*, [1905] A. C. 115, overruling *Belt* v. *Lawes* (1884), 12 Q. B. D. 356, C. A., where the court with the plaintiff's consent so reduced the damages. The latter decision had been frequently acted on by the Court of Appeal.

# DANCING.

*See* THEATRES ETC.

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# DAY.

*See* TIME.

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# DEAD FREIGHT.

*See* SHIPPING AND NAVIGATION.

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# DEAF AND DUMB.

*See* EDUCATION; EVIDENCE; INFANTS AND CHILDREN.

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# DEAN AND CHAPTER.

*See* CORPORATIONS; ECCLESIASTICAL LAW.

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# DEATH DUTIES.

*See* ESTATE AND OTHER DEATH DUTIES.

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# DEATH, PRESUMPTION OF.

*See* EVIDENCE; EXECUTORS AND ADMINISTRATORS; WILLS; *and other Titles.*

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# DEBENTURES.

*See* COMPANIES.

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# DEBT, ACKNOWLEDGMENT OF.

*See* EVIDENCE; LIMITATION OF ACTIONS.

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# DEBTOR AND CREDITOR.

*See* BANKRUPTCY AND INSOLVENCY.

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# DEBTORS ACT.

*See* BANKRUPTCY AND INSOLVENCY.

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# DEBTS, ASSIGNMENT OF.

*See* CHOSES IN ACTION.

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# DEBTS, ATTACHMENT OF.

*See* EXECUTION; PRACTICE AND PROCEDURE.

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# DECEIT.

*See* MISREPRESENTATION AND FRAUD.

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# DECIDED CASES.

*See* JUDGMENTS AND ORDERS.

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# DECLARATIONS, DYING.

*See* CRIMINAL LAW AND PROCEDURE; EVIDENCE.

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# DECLARATIONS, STATUTORY.

*See* EVIDENCE.

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# DEDICATION OF HIGHWAY.

*See* HIGHWAYS, STREETS AND BRIDGES.

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# DEEDS AND OTHER INSTRUMENTS.


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NOTE.—Under this heading only documents of a non-testamentary character are treated, and only generally. For deeds and instruments of a particular nature, see titles *passim*. For forms, see Encyclopædia of Forms and Precedents.

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# Part I.—Deeds.

## SECT. 1.—*Definition and Effect of a Deed.*

SECT. 1. Definition and Effect of a Deed.

Definition of a deed.

**649.** A deed is an instrument written on parchment or paper, expressing the intention or consent of some person or corporation named therein to make (otherwise than by way of testamentary disposition), confirm, or concur in some assurance of some interest in property or of some legal or equitable right, title, or claim, or to undertake or enter into some obligation, duty, or agreement enforceable at law or in equity, or to do or concur in some other act affecting the legal relations or position of a party to the instrument or of some other person or corporation, sealed with the seal of the party so expressing such intention or consent, and delivered as such party's act and deed to the person or corporation intended to be affected thereby (*a*).

Effect of a deed.

**650.** The effect of executing a deed is that the party, whose act and deed it is, is conclusively bound by the intention or consent expressed therein; he is, as a rule, estopped from averring and proving by extrinsic evidence that the intention or consent so expressed was not in truth his intention or consent, or that there are reasons why he should not be obliged to give effect to the intention or consent so expressed (*b*). This is equally the case whether the deed be expressed to operate as a conveyance of property or as a contract or otherwise (*c*).

Consideration not necessary.

It follows, therefore, that, where a deed purports to make a gratuitous assurance of any property or right, or to express in the form of a contractual obligation a gratuitous promise, it is not open to the party who has so made the assurance or promise to aver or prove that he received nothing by way of consideration in return therefor, and the deed will take effect according to its terms notwithstanding the absence of any consideration (*d*). This is

(*a*) *Goddard's Case* (1584), 2 Co. Rep. 4 b, 5 a; Co. Litt. 35 b, 171 b; Spelman's Glossary, *sub voce* Factum; Les Termes de la Ley, *sub voce* Fait; Shep. Touch. 50, 51; 2 Bl. Com. 295—342; *Brown* v. *Vawser* (1804), 4 East, 584; *R.* v. *Fauntleroy* (1824), 2 Bing. 413, 423, 424, 428; *Chanter* v. *Johnson* (1845), 14 M. & W. 408; *Hall* v. *Bainbridge* (1848), 12 Q. B. 699; *R.* v. *Morton* (1873), L. R. 2 C. C. R. 22, 27; *Inland Revenue Commissioners* v. *Angus* (1889), 23 Q. B. D. 579, 582, C. A.

(*b*) Littleton's Tenures, ss. 58, 693; Co. Litt. 45 a, 47 b, 352 a, 363 b; 1 Plowd. 308, 309; *Whelpdale's Case* (1604), 5 Co. Rep. 119 a; *Style* v. *Hearing* (1605), Cro. Jac. 73; 2 Bl. Com. 295, 446; *Goodtitle* d. *Edwards* v. *Bailey* (1777), 2 Cowp. 597; *Webb* v. *Austin* (1844), 7 Man. & G. 701, 724 *et seq.*; *Harding* v. *Ambler* (1838), 3 M. & W. 279; *Doe* d. *Levy* v. *Horne* (1842), 3 Q. B. 757, 760, 766; *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296; *Hunter* v. *Walters* (1871), 7 Ch. App. 75; *King* v. *Smith*, [1900] 2 Ch. 425; *Howatson* v. *Webb*, [1907] 1 Ch. 537; affirmed [1908] 1 Ch. 1, C. A. As to estoppel generally, see title ESTOPPEL.

(*c*) See the cases cited in the previous note.

(*d*) Fitzherbert, Grand Abridgment, tit. Barre, 37; *Anon.* (1563), Moore (K. B.), 47, pl. 142; *Pinnel's Case* (1602), 5 Co. Rep. 117 a, 117 b; Co. Litt. 212 b; *Edwards* v. *Weeks* (1677), 2 Mod. Rep. 259; *Spicer* v. *Hayward* (1700), Prec. Ch. 114; *Shubrick* v. *Salmond* (1765), 3 Burr. 1637, 1639; *Lomas* v. *Wright* (1833), 2 My. & K. 769; *Bunn* v. *Guy* (1803), 4 East, 190, 200; *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551, 554, *per* ABBOTT, C.J.; *Wallis* v. *Day* (1837), 2 M. & W. 273, *per* PARKE, B., at p. 277; *Clough* v. *Lambert* (1839), 10 Sim. 174; *Watson* v. *Parker* (1843), 6 Beav. 283; and consider

SECT. 1. Definition and Effect of a Deed.

especially noteworthy in the cases of gratuitous promises expressed in a deed, because the law is that promises made otherwise than by deed are not enforceable unless given for valuable consideration (*e*).

Promise in restraint of trade.

In one instance a promise made by deed is not enforceable unless it is made for valuable consideration, that is, where the act or forbearance agreed to be done or observed is in restraint of trade, but is not such as would of itself invalidate the promise for being in unreasonable restraint of trade (*f*).

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*Turner* v. *Vaughan* (1767), 2 Wils. 339; *Hill* v. *Spencer* (1767), 2 Amb. 641, 836; *Gray* v. *Mathias* (1800), 5 Ves. 286; *Nye* v. *Moseley* (1826), 6 B. & C. 133; *Hall* v. *Palmer* (1844), 3 Hare, 532; *Re Stewart, Ex parte Pottinger* (1878), 8 Ch. D. 621, C. A.; *Re Vallance, Vallance* v. *Blagden* (1884), 26 Ch. D. 353; *Re Whitaker, Whitaker* v. *Palmer*, [1901] 1 Ch. 9, C. A. This effect of a deed has been explained by saying that a deed imports a consideration on account of the solemnity with which it is executed, and this saying has been elevated into a rule of law (1 Plowd. 308, 309; Bacon, Reading upon the Statute of Uses; 2 Bl. Com. 446; 1 Fonblanque, Treatise of Equity, 342, n.; 2 Fonblanque, Treatise of Equity, 26). But the truth appears to be that the binding effect of a deed in constraining the parties thereto to the strict performance or observance of the terms expressed therein, notwithstanding that they may have received nothing in return, is due to the importance attached in our early law to writing as a mode of proof of a man's intention or consent to make some assurance of property, or to be bound by some promise. In the Middle Ages, when most men were illiterate, peculiar solemnity attached to a written record of a man's intention to make a gift of land or to pay a sum of money or perform some other act; and it was held that, when a writing of this kind was produced, the person purporting to be bound thereby should be obliged to give effect to his intention as expressed therein, unless he could show that the writing was forged, or that his consent thereto had been extorted by using force, causing fear, or practising fraud. In times soon after the Norman conquest it was considered that a writing should have this effect, even though it were unsealed. But afterwards it was required that the seal of the person intended to be bound should be affixed to the writing as a guarantee of its authenticity, or else it should not be admitted in evidence against him. And the peculiar effect so attributed by the early common law to a sealed writing has ever since remained established as a part of English law, and has not been affected by the facts that in modern times writing has ceased to be a rare accomplishment and is continually used in business and other intercourse, that parol agreements in the way of executory promises have become enforceable at law where valuable consideration has been given in return for the promise, and that unsealed writings have been allowed to be produced in evidence of some parol agreement. Thus the binding force of a sealed writing or deed existed in law long before the development of the doctrine of valuable consideration as the test of enforceability of an informal promise, and still remains unaffected by that doctrine (see Glanv. x., 12; Bract. fo. 100, 396; Britton, liv. 1, c. 29, ss. 5, 14—22; Fleta, lib. ii., c. 56, s. 20, and c. 60, s. 25; Y. B. 30 Edw. 1, p. 158; Bigelow, Placita Anglo-Normannica, 175, 177; Holmes on the Common Law, 272; 2 Pollock and Maitland, History of English Law, 182 *et seq.*, 217—223; *Rann* v. *Hughes* (1778), 7 Term Rep. 350, n., H. L.).

(*e*) See previous note. As to consideration generally, see title CONTRACT, Vol. VII., p. 383.

(*f*) The explanation of this is that, as a general rule, all contracts in restraint of trade are void, and promises in reasonable restraint of trade have been admitted to be valid as an exception to this principle, and only upon condition that they should be made for valuable consideration (see *Mitchel* v. *Reynolds* (1711), 1 P. Wms. 181; 1 Smith, L. C., 11th ed., 406; *Davis* v. *Mason* (1793), 5 Term Rep. 118, 120; *Hitchcock* v. *Coker* (1837), 6 Ad. & El. 438, 456, Ex. Ch.; *Archer* v. *Marsh* (1837), *ibid.* 959; *Wallis* v. *Day* (1837), 2 M. & W. 273, 277, 281; *Leighton* v. *Wales* (1838), 3 M. & W. 545, 551; *Ward* v. *Byrne* (1839), 5 M. & W. 548, 559; *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, 541, 542, 544, 553, 564, 565, 575; *Haynes* v. *Doman*, [1899] 2 Ch. 13, C. A.; *Dowden and Pook, Ltd.* v. *Pook*, [1904] 1 K. B. 45. See also title TRADE AND TRADE UNIONS.

And in one particular a gratuitous promise made by deed is not equally enforceable with a promise made for valuable consideration, for the courts will not order the specific performance of a voluntary covenant (*g*).

Specific performance.

Also, if one makes to another a conveyance (*h*) by deed of freehold lands or hereditaments, and the deed contains no apparent consideration for the conveyance nor any declaration to whose use it is made, the law intends that the conveyance was made for the transferor's own use, the transferee becomes seised of the hereditaments assured to the use of the transferor, and by the Statute of Uses (*i*) the transferor is immediately deemed to be in lawful seisin and possession of the same lands or hereditaments for such estate as he has in the use, and the estate that was in the transferee is deemed to be in the transferor; in other words, the use, and with it the estate conveyed, at once results to the transferor (*k*).

Conveyance of land without consideration.

**651.** Apart from the absence of valuable consideration a man is not precluded by the fact that his act *in pais* (*l*) is evidenced by deed from averring any ground of avoidance of that act which he might have asserted if the act had been accomplished by word of mouth or unsealed writing. Thus, any party to a deed may aver and prove by extrinsic evidence that he has not given such true, full, and free consent to the transaction expressed therein as will render it unimpeachable, or that the deed cannot take effect as expressed by reason of some legal incapacity affecting him, or that on account of some rule of law or equity the deed ought not to bind him according to its purport (*m*). For example, a party to a deed is not estopped from proving that it is void because he was induced by the machinations of some other person to execute it under a mistake (not due to his own carelessness or inadvertence) as to the substance of the transaction expressed to be effected thereby (*n*), or because he and the other parties executed the deed under a mutual mistake of fact (*o*). So a man may well aver, in opposition to his own deed, that he was induced to execute it by fraud (*p*),

Mistake, fraud, misrepresentation etc.

(*g*) *Colman* v. *Sarrel* (1789), 1 Ves. 50, 55; *Ellison* v. *Ellison* (1802), 6 Ves. 656, 662; *Jefferys* v. *Jefferys* (1841), Cr. & Ph. 138; *Meek* v. *Kettlewell* (1842), 1 Hare, 464; (1843) 1 Ph. 342; *Dening* v. *Ware* (1856), 22 Beav. 184, 189; *Tatham* v. *Vernon* (1861), 29 Beav. 604, 615; *Re Ellenborough, Towry Law* v. *Burne*, [1903] 1 Ch. 697.

(*h*) Not including the appointment of a use under a power of appointment.

(*i*) 27 Hen. 8, c. 10, s. 1 (1535).

(*k*) *Beckwith's Case* (1589), 2 Co. Rep. 56 b, 58; *Armstrong* v. *Wolsey* (1755), 2 Wils. 19; 1 Sanders on Uses, 4th ed., 99 *et seq.*; Sugden, note to Gilbert on Uses, 233; Burton's Compendium, 38, 42, 43; Williams on Real Property, 13th ed., 160, 190; 20th ed., 172, 203; Davidson, Precedents in Conveyancing, 4th ed., Vol. II., Part I., p. 182; Williams on Settlements, 17—19, 22, 38; see title REAL PROPERTY AND CHATTELS REAL.

(*l*) Acts *in pais* are opposed to acts in a court of record, and include deeds (*Beverley's Case* (1603), 4 Co. Rep. 123 b, 124 a.

(*m*) See the authorities cited in the notes following.

(*n*) See p. 405, *post.*

(*o*) *Colyer* v. *Clay* (1843), 7 Beav. 188; *Scott* v. *Coulson*, [1903] 1 Ch. 453; affirmed [1903] 2 Ch. 249, C. A.; see p. 407, *post.* See further, as to mistake, title MISTAKE.

(*p*) *Edwards* v. *M'Leay* (1815), Coop. G. 308; (1818) 2 Swan. 287; *Trevelyan* v. *White* (1839), 1 Beav. 588; S. C. *sub nom. Charter* v. *Trevelyan* (1842, 1844), 11 Cl. & Fin. 714, H. L.; *Stump* v. *Gaby* (1852), 2 De G. M. & G. 623,

SECT. 1. Definition and Effect of a Deed.

Disability.

misrepresentation (*q*), duress (*r*), or undue influence (*s*), and prove that for this reason it is voidable.

And it may equally well be alleged that a party to a deed was at the time of its execution under the disability of infancy (*t*), insanity (*a*), drunkenness (*b*), coverture (*c*), or conviction of felony (*d*), or, in the case of a corporation, that the act purported to be effected by the deed was *ultra vires* (*e*); and it may be shown that the deed is on that account void or voidable, according to the effect of the particular incapacity pleaded.

Again, where the object of an agreement made by deed is unlawful, because the act to be performed is illegal or is such as the law will not constrain men to do, the agreement is no more enforceable than if it had been made by parol (*f*).

So also a man is not estopped by the fact that he has executed a writing under seal from proving that he has an equitable right to have the writing rectified, if it were executed in such circumstances as the courts consider to be good ground for granting this relief (*g*). And a sale carried out by deed is voidable if it is in effect a sale by a trustee for sale to himself (*h*).

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630, 631; *Athenæum Life Assurance Society* v. *Pooley* (1858), 3 De G. & J. 294; *National Provincial Bank of England* v. *Jackson* (1886), 33 Ch. D. 1, 13, 15, C. A.; *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192, 197. See title MISREPRESENTATION AND FRAUD.

(*q*) See *Carter* v. *Boehm* (1766), 3 Burr. 1905; *Morrison* v. *Universal Marine Insurance Co.* (1873), L. R. 8 Exch. 197, Ex. Ch.; *Hemmings* v. *Sceptre Life Association, Ltd.*, [1905] 1 Ch. 365, 369; see *Doe* d. *Lloyd* v. *Bennett* (1837), 8 C. & P. 124. See title MISREPRESENTATION AND FRAUD.

(*r*) *Whelpdale's Case* (1604), 5 Co. Rep. 119 a. See title FRAUDULENT AND VOIDABLE CONVEYANCES.

(*s*) *Sturge* v. *Sturge* (1849), 12 Beav. 229; *Gresley* v. *Mousley* (1859), 4 De G. & J. 78. See title FRAUDULENT AND VOIDABLE CONVEYANCES.

(*t*) Littleton's Tenures, s. 259; Co. Litt. 171 b; *Whelpdale's Case*, *supra*. See title INFANTS AND CHILDREN.

(*a*) *Thompson* v. *Leach* (1698), 1 Ld. Raym. 313; *Yates* v. *Boen* (1738), 2 Stra. 1104; *Elliot* v. *Ince* (1857), 7 De G. M. & G. 475; *Re Walker* (*a Lunatic so found*), [1905] 1 Ch. 160, C. A. See title LUNATICS AND PERSONS OF UNSOUND MIND.

(*b*) See *Cole* v. *Robins* (1703), 1 Buller, Nisi Prius, 172; *Matthews* v. *Baxter* (1873), L. R. 8 Exch. 132; and title CONTRACT, Vol. VII., p. 342.

(*c*) *Cole* v. *Delawn* (1673), 3 Keb. 228; Co Litt. 42 b, n. (4); 1 Bl. Com. 444; see title HUSBAND AND WIFE.

(*d*) See Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 8; and titles CONTRACT, Vol. VII., p. 342; CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429.

(*e*) *Wenlock* (*Baroness*) v. *River Dee Co.* (1885), 10 App. Cas. 354; see title CORPORATIONS, Vol. VIII., p. 300.

(*f*) Co. Litt. 206 b; *Whelpdale's Case*, *supra*; Shep. Touch. 371, 372; Bac. Abr. Obligation (E); *Mitchel* v. *Reynolds* (1711), 1 P. Wms. 181, 189 *et seq.*; 1 Smith, L. C., 11th ed., 406; *Walker* v. *Perkins* (1764), 1 Wm. Bl. 517; *Collins* v. *Blantern* (1767), 2 Wils. 341, 351, 352; 1 Smith, L. C., 11th ed., 369; *Colton* v. *Goodridge* (1776), 2 Wm. Bl. 1108; *Cannan* v. *Bryce* (1819), 3 B. & Ald. 179 (gambling in differences); *Gedge* v. *Royal Exchange Assurance Corporation*, [1900] 2 Q. B. 214 (marine policy void for insertion of clause illegal by statute); *Lodge* v. *National Union Investment Co., Ltd.*, [1907] 1 Ch. 300 (illegal money-lending); and see title CONTRACT, Vol. VII., pp. 390 *et seq.*

(*g*) *Uvedale* v. *Halfpenny* (1723), 2 P. Wms. 151; *Motteux* v. *London Assurance Co.* (1739), 1 Atk. 545; *Ball* v. *Storie* (1823), 1 Sim. & St. 210; *White* v. *White* (1872), L. R. 15 Eq. 247; *Re Bird's Trusts* (1876), 3 Ch. D. 214; *Hanley* v. *Pearson* (1879), 13 Ch. D. 545; *Cowen* v. *Truefitt, Ltd.*, [1899] 2 Ch. 309, C. A.; *Beale* v. *Kyte*, [1907] 1 Ch. 564. See title MISTAKE.

(*h*) *Randall* v. *Errington* (1805), 10 Ves. 423; *Silkstone and Haigh Moor Coal Co.* v. *Edey*, [1900] 1 Ch. 167. See title TRUSTS AND TRUSTEES.

## SECT. 2.—*When a Deed is necessary.*

SECT. 2. When a Deed is necessary.

### SUB-SECT. 1.—*At Common Law.*

**652.** A deed is necessary for every transaction which the common law requires to be evidenced by writing (*i*).

Conveyance of incorporeal hereditaments.

Hence at law a deed is necessary to make a grant or any other conveyance taking effect between living persons of any incorporeal hereditament, or any estate or interest therein, including a chattel interest such as a lease for years of an incorporeal hereditament (*k*). And this is equally the case whether the grant enure by way of the original creation of some incorporeal hereditament which did not exist before, as in the case of the grant *de novo* of an easement (*l*), a *profit à prendre*, such as the right of killing and taking away game or fish (*m*), or a rent (*n*); or whether the grant take effect as a transfer of some existing incorporeal hereditament or any estate or interest therein, as where an assignment is made of a rent-charge in fee previously created (*o*); or where a lease for years of some other incorporeal hereditament already existing is made, assigned, or surrendered (*p*). A deed is equally necessary for the conveyance of such incorporeal hereditaments as a reversion or remainder expectant on an estate tail, for life or for years, in land as for the assurance of purely incorporeal hereditaments (*q*).

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(*i*) Littleton's Tenures, ss. 183, 217, 250, 252, 358—367, 541, 542, 551, 618, 628; Co. Litt. 9, 49 a, 85 a, 121 b, 143 a, 169, 172 a, 307 a, 338 a. The reason of this is that by the common law a man's writing was required to be authenticated by his seal; see p. 357, note (*d*), *ante*.

(*k*) Littleton's Tenures, ss. 183, 551—569, 618, 627, 628; Co. Litt. 9 a, b, 42 a, 85 a, 121 a, b, 172 a, 307 a, 332 a, 335 b; Shep. Touch. 227—230; 2 Bl. Com. 317. As to the effect of an agreement specifically enforceable to grant some incorporeal hereditament, see pp. 377, 378, *post*.

(*l*) *Hewlins* v. *Shippam* (1826), 5 B. & C. 221; *Bryan* v. *Whistler* (1828), 8 B. & C. 288; *Cocker* v. *Cowper* (1834), 1 Cr. M. & R. 418; *Durham and Sunderland Rail. Co.* v. *Walker* (1842), 2 Q. B. 940, 967, Ex. Ch.; *Proud* v. *Bates* (1865), 34 L. J. (CH.) 406, 411; *May* v. *Belleville*, [1905] 2 Ch. 605. See also title EASEMENTS AND PROFITS À PRENDRE.

(*m*) *Wickham* v. *Hawker* (1840), 7 M. & W. 63, 76—79; *Ewart* v. *Graham* (1859), 7 H. L. Cas. 331, 334, 335; *Hooper* v. *Clark* (1867), L. R. 2 Q. B. 200; *Adams* v. *Clutterbuck* (1883), 10 Q. B. D. 403, 405; see *Lowe* v. *Adams*, [1901] 2 Ch. 598.

(*n*) Littleton's Tenures, s. 218; Co. Litt. 144 a, 160 a.

(*o*) Littleton's Tenures, ss. 556, 616, 618, 627; Co. Litt. 9 a, b, 172 a. At common law an existing rent-charge could not be granted over without the attornment of the terre-tenant (Littleton's Tenures, s. 556); but by stat. (1706), 4 & 5 Ann. c. 3, s. 9, the necessity of attornment was abolished.

(*p*) *Lincoln College Case* (1595), 3 Co. Rep. 58 b, 62 b, 63 a; Co. Litt. 85 a, n. (2), 338 a; *Hewlins* v. *Shippam*, *supra*, at pp. 228—233; *Somerset* (*Duke*) v. *Fogwell* (1826), *ibid.* 875, 886; *Bird* v. *Higginson* (1835), 2 Ad. & El. 696, 704; affirmed (1837) 6 Ad. & El. 824, Ex. Ch.; *Wood* v. *Leadbitter* (1845), 13 M. & W. 838, 842, 843; *Thomas* v. *Fredricks* (1847), 10 Q. B. 775, 783.

(*q*) Littleton's Tenures, ss. 515 *et seq.*, 553, 567—573, 578, 618, 627; Co. Litt. 49 a, 172 a, 315 b, 332 a; Shep. Touch. 230; 2 Bl. Com. 317; *Haggerston* v. *Hanbury* (1826), 5 B. & C. 101; *Doe* d. *Were* v. *Cole* (1827), 7 B. & C. 243, 248; *Doe* d. *Lloyd* v. *Bennett* (1837), 8 C. & P. 124. At common law, the grant of an estate in reversion or remainder was not effectual without the tenant's attornment (see the authorities cited), but by stat. (1706) 4 & 5 Ann. c. 3, s. 9, the necessity of attornment was abolished.

SECT. 2. When a Deed is necessary.

Right to enter and remain on land for a certain time.

**653.** So also at law the right to enter upon land and to remain there for a certain time can only be effectually given by deed, unless the grant of such right be coupled with a conveyance, which is valid without deed, of something on the land (*r*). Thus, a grant made without deed, although for valuable consideration, of the right to enter upon a certain close belonging to the grantor on certain specified days and to remain there during certain hours of each day (during which races are to be held), as it purports to exceed the privilege given by a mere licence and to confer an interest in the land, is void as such at law (*s*). But if a man has a flock of sheep in his field, and without deed sells to another all the wool on the sheep, together with the right to go into the field and to shear the sheep there, the buyer would have a valid legal right to enter upon the field and to stay there until he had finished the shearing (*t*).

Condition in defeasance of freehold estate.

**654.** A condition which is made by any act, agreement, or instrument taking effect between living persons, and which may operate in defeasance of an estate of freehold in any lands, tenements, or hereditaments, is also required by law to be evidenced by deed (*a*).

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(*r*) *Wood* v. *Leadbitter* (1845), 13 M. & W. 838, 842, 843.

(*s*) *Ibid.* At law such a grant amounts to a mere licence to go on the land, and is revocable accordingly. But an agreement made without deed, but for valuable consideration, to give such a right is enforceable, if put in writing and signed by the party to be charged thereunder, as a contract; and damages may be recovered for any breach of the agreement, or the contract may be specifically enforced (Statute of Frauds (29 Car. 2, c. 3), s. 4). As to the effect of a contract, which has been made without deed but is specifically enforceable, to grant such a right, see p. 378, *post*. As to the scope and effect of a mere licence, see *Wood* v. *Leadbitter*, *supra*. And see further, as to licences in relation to real estate, title REAL PROPERTY AND CHATTELS REAL.

(*t*) *Wood* v. *Manley* (1839), 11 Ad. & El. 34; *Wood* v. *Leadbitter*, *supra*. It appears that if there were a mere gift of the wool, coupled with such right of entry as above mentioned, no valid legal right of entry and remaining on the land would be conferred, but only a revocable licence; since gifts of chattels cannot well be made, where there is no delivery of possession, without deed (see p. 364, *post*).

(*a*) Littleton's Tenures, ss. 365—369; Co. Litt. 225 a, b, 226 b, 228 a, b; Shep. Touch. 119, 120. It appears from these authorities that, at common law, before the Statute of Frauds (29 Car. 2, c. 3), when feoffments could well be made by word of mouth coupled with livery of seisin (see Littleton's Tenures, 214—217; Co. Litt. 142 b, 143 a), any condition affecting the estate given by the feoffment might well be made by word of mouth alone, though it could only be effectually pleaded if made by deed, unless the party pleading it were in a position to obtain the special verdict of a jury that it had been duly made by parol. Since wills of freehold lands have been allowed by statute (stats. (1540) 32 Hen. 8, c. 1; (1544) 34 & 35 Hen. 8, c. 5; (1660) 12 Car. 2, c. 24; replaced by the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), conditions affecting any devised estate of freehold may well be made by will or codicil (*Warren* v. *Lee* (1556), Dyer, 126 b, 127 a; see 2 Jarman on Wills, 5th ed., ch. 27, p. 842). It seems that, after the passing of the Statute of Frauds (29 Car. 2, c. 3) until the end of the year 1844 (see stat. (1844) 7 & 8 Vict. c. 76, ss. 3, 13; repealed by the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 1) conditions affecting estates of freehold might be made on a feoffment by writing signed as required by the Statute of Frauds (29 Car. 2, c. 3); subject, of course, to the common law rule as to pleading any condition so made (see Shep. Touch. 120, Preston's ed.). But since the Real Property Act, 1845 (8 & 9 Vict. c. 106), ss. 2 and 3, enabled corporeal hereditaments to be transferred after the 1st October, 1845, by deed of grant, and provided that feoffments made after that day (other

Release.

An express release, whether of a right in any lands, tenements or hereditaments, goods or chattels (*b*), or of any real or personal action, claim or demand, can only be made at common law by deed (*c*). Thus, an express discharge given without valuable consideration of any obligation arising from a breach of contract (such as a debt (*d*)) or from a wrong (*e*) must always be made by deed (*f*). And as a rule an obligation arising (before breach) under a contract executed by the other party thereto, as a promise to pay on a future day for goods delivered or money lent in consideration of such promise, can only be discharged, without valuable consideration, by deed (*g*).

Power of attorney.

**655.** A deed is also required at common law for any power of attorney which authorises the attorney to execute a deed or to deliver seisin on the principal's behalf (*h*).

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than those made by an infant under a custom) should be void at law unless evidenced by deed, all conditions affecting any estate of freehold, and not imposed by will, must of necessity be made by deed. It does not appear that by the custom of gavelkind an infant is enabled to make a feoffment upon condition (see Sandys, Consuetudines Kanciæ, 165—169; Robinson on Gavelkind, 5th ed., 162—175; Davidson, Precedents in Conveyancing, 4th ed., Vol. II., Part I., pp. 244, 245, n. (a); *Re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525, 528.

(*b*) It appears that regularly an express release of right in goods or chattels must be made by deed (*Jennor and Hardie's Case* (1587), 1 Leon. 283, *per* ANDERSON, C.J.; 3 Preston, Abstracts of Title, 2nd ed., 118, and authorities cited in the next note). But in modern law, where goods are in the possession of a bailee, the owner may well make a gift of them to the bailee by word of mouth only; though such a gift may appear to be in the nature of a release of right. But this is because the change, which takes place in the bailee's possession when he ceases to hold the goods as bailee and begins to keep them as owner, is equivalent to actual delivery of the possession of the goods at the time of the gift (see *Winter* v. *Winter* (1861), 9 W. R. 747; *Kilpin* v. *Ratley*, [1892] 1 Q. B. 582; *Cain* v. *Moon*, [1896] 2 Q. B. 283). On this ground it appears that a similar gift may be made to a finder or taker of goods who is in possession of them (Shep. Touch., 240, 241).

(*c*) Littleton's Tenures, ss. 444 *et seq.*; Co. Litt. 264 b; Shep. Touch. 320, 321, 323; and see *Lampet's Case* (1612), 10 Co. Rep. 46 b, 48 a, b; *Jennor and Hardie's Case*, *supra*; 3 Chitty on Pleading, 7th ed., 112, 313.

(*d*) *Pinnel's Case* (1602), 5 Co. Rep. 117 a, b; *Edwards* v. *Weeks* (1677), 2 Mod. Rep. 259; *May* v. *King* (1701), 12 Mod. Rep. 537; *Reeves* v. *Brymer* (1801), 6 Ves. 516; *Cross* v. *Sprigg* (1849), 6 Hare, 552; *Edwards* v. *Walters*, [1896] 2 Ch. 157, 168, C. A. As to the discharge of the obligation arising from a breach of contract, see title CONTRACT, Vol. VII., p. 454.

(*e*) See authorities cited in note (*c*), *supra*.

(*f*) Express releases of a debt or of the liability to pay damages are of no effect in equity, if not made by deed, unless they are given for valuable consideration (*Edwards* v. *Walters*, *supra*).

(*g*) *Blackhead* v. *Cock* (1614), 1 Roll. Rep. 43, 44; *Foster* v. *Dawber* (1851), 6 Exch. 839, 851; *Edwards* v. *Walters*, *supra*. The only exception is that a bill of exchange or promissory note is discharged if the holder, at or after its maturity, absolutely and unconditionally renounce his rights against the acceptor or maker, provided that the renunciation be in writing, or the bill or note be delivered up to the acceptor or maker (see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 62 (1), 89; *Edwards* v. *Walters*, *supra*).

(*h*) Co. Litt. 52 a; Shep. Touch. 217; 1 Preston, Abstracts of Title, 2nd ed., 293; *Steiglitz* v. *Egginton* (1815), Holt (N. P.), 141; *Berkeley* v. *Hardy* (1826), 5 B. & C. 355; *Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555, 563, 565, 566, C. A., where the rule seems to have been recognised in equity;

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As a general rule a corporation can only bind itself by deed under its corporate seal (*i*).

Gift of goods without delivery.

Gifts or gratuitous assignments of choses in possession, that is to say, of tangible goods, must, if not accompanied by delivery of possession, be made by deed (*j*). And all gratuitous promises must be made by deed in order to become legally enforceable (*k*).

Assignment of letters patent.

It appears that by the common law a deed is required for the assignment of the benefit of letters patent conferring the privilege of the exclusive use of an invention (*l*).

SUB-SECT. 2.—*By Statute.*

Bargain and sale of freeholds.

**656.** Bargains and sales of any estate of inheritance or freehold in any manors, lands, tenements, or hereditaments are required to be made by deed indented, and also to be enrolled, as provided by the statute 27 Hen. 8, c. 16, or they cannot operate under the Statute of Uses (*m*) as a conveyance of the legal estate (*n*).

Leases by ecclesiastical persons.

The leases authorised by the statute 32 Hen. 8, c. 28, to be made by ecclesiastical persons seised in fee in right of their churches are required to be made by deed indented (*o*).

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Davidson, Precedents in Conveyancing, 4th ed., Vol. I., 475, n., ; 5th ed., 387, n. It does not appear that an authority to do any other act than the execution of a deed or the delivery of seisin is required to be given by deed. Thus a power for the assignee of a chose in action to sue at law in the assignor's name was not required to be given by deed (*Howell* v. *MacIvers* (1792), 4 Term Rep. 690 ; *Pickford* v. *Ewington* (1835), 4 Dowl. 453 ; *Mangles* v. *Dixon* (1852), 3 H. L. Cas. 702, 726). And an authority to enter on the principal's behalf into any contract not requiring a deed may well be given without deed (see Sugden, Vendor and Purchaser, 14th ed., 145; 1 Benjamin on Sale, 2nd ed., 197 ; *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267). So also an authority to sign any document other than a deed on the principal's behalf need not be given by deed (*R.* v. *Kent Justices* (1873), L. R. 8 Q. B. 305, 307 ; *Re Whitley Partners, Ltd.* (1886), 32 Ch. D. 337, C. A. ; *Sims* v. *Landray*, [1894] 2 Ch. 318).

(*i*) Bac. Abr. Corporations (E, 3) ; 1 Bl. Com. 475 ; *Ludlow Corporation* v. *Charlton* (1840), 6 M. & W. 815, 820; *Kidderminster Corporation* v. *Hardwick* (1873), L. R. 9 Exch. 13 ; *Oxford Corporation* v. *Crow*, [1893] 3 Ch. 535). For the exceptions, see 2 Williams, Vendor and Purchaser, 858—860. See title CORPORATIONS, Vol. VIII., p. 380.

(*j*) *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551, 552, 554; *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57, 61, 67, 73, 75, C. A. Such a deed of assignment, if not followed by delivery of possession of the goods assigned within seven days after its execution, is voidable with respect to the goods remaining in the assignor's apparent possession and as against the assignor's creditors and persons claiming under a subsequent registered absolute bill of sale of the goods, unless it be attested and registered as a bill of sale under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), ss. 4, 8, 10, 11 ; *Tuck* v. *Southern Counties Deposit Bank* (1889), 42 Ch. D. 471, 481, 483, C. A. ; and see *Antoniadi* v. *Smith*, [1901] 2 K. B. 589, C. A. ; *Casson* v. *Churchley* (1884), 53 L. J. (Q. B.) 335. See title BILLS OF SALE, Vol. III., p. 1. See as to goods in possession of a bailee, p. 363, note (*b*), *ante*.

(*k*) P. 357, note (*d*), *ante*.

(*l*) *Re Casey's Patents, Stewart* v. *Casey*, [1892] 1 Ch. 104, 110, 113, C. A.; in which case it was, however, decided that an equitable assignment of a patent may well be made without deed, and that such an assignment may be registered as affecting the proprietorship of the patent. See title PATENTS AND INVENTIONS.

(*m*) 27 Hen. 8, c. 10 (1535).

(*n*) Stat. (1535) 27 Hen. 8, c. 16, s. 1. See title REAL PROPERTY AND CHATTELS REAL.

(*o*) Co. Litt. 44 ; stat. (1540) 32 Hen. 8, c. 28, was repealed by stat. (1856)

Appointment of guardian.

**657.** The appointment by a father (*p*) or a mother (*q*) of a guardian by statute of his or her child or children must, if not made by will, be made by deed.

Assurance for charitable uses.

**658.** Every assurance to take effect between living persons of any hereditaments, corporeal or incorporeal (not being land of copyhold or customary tenure), to or for the benefit of any charitable uses, and every assurance to take effect between living persons of personal estate (not being stock in the public funds) to be laid out in the purchase of land or other hereditaments to or for the benefit of any charitable uses, must, as a rule, be made by deed, or it will be void (*r*).

Conveyances under Glebe Exchange Act.

Conveyances made under the powers given by the Glebe Exchange Act, 1815 (*s*), are required to be made by deed indented.

Disentailing assurances of freeholds.

**659.** Every disposition made by way of disentailing assurance of lands, tenements or hereditaments, corporeal or incorporeal (not being copyhold), or any undivided share thereof (whether for a legal or equitable estate), under the Fines and Recoveries Act, 1833 (*t*), by a tenant in tail or a person who, where an estate tail has been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred (*u*), is required to be made or evidenced by deed, or it will not be of any force either at law or in equity under that Act (*a*); and every such disposition by a tenant in tail or such person as aforesaid under that Act of any equitable estate in any copyhold hereditaments must, if not made by surrender under that Act, be made by deed (*b*); and every such disposition under that Act by a tenant in tail in

Equitable estates in copyholds.

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19 & 20 Vict. c. 120, s. 35, except as to leases made by persons having an estate in right of their churches. See also title ECCLESIASTICAL LAW.

(*p*) Stat. (1660) 12 Car. 2, c. 24, s. 8. As to the execution and attestation of such deeds, see p. 399, *post*,

(*q*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 3. See, further, title INFANTS AND CHILDREN.

(*r*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), ss. 4 (1), (6), 10 (i.), (iii.), amended by the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), ss. 3—5, and replacing the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), and the Acts amending it. The deed must be enrolled as provided by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), ss. 4 (1), (9), 5. As to the execution and attestation of such deeds, see p. 393, *post*. For the exceptions, see Part III. of the Mortmain and Charitable Uses Act, 1888. See title CHARITIES, Vol. IV., p. 124.

(*s*) 55 Geo. 3, c. 147, s. 1. As to the execution of such deeds, see p. 393, *post*.

(*t*) 3 & 4 Will. 4, c. 74; see ss. 1, 15—21. As to Ireland, see the Fines and Recoveries (Ireland) Act, 1834 (4 & 5 Will. 4, c. 92), ss. 1, 12—18, 38, 39.

(*u*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 1, 19; *Bankes* v. *Small* (1887), 36 Ch. D. 716, C. A.

(*a*) *Ibid.*, s. 40; and see ss. 47, 50. The deeds effecting such dispositions are also required to be enrolled in accordance with the provisions of the Act, except in the case of leases made for terms not exceeding twenty-one years on the terms specified in the Act (see s. 41; Rules of the Supreme Court, 1883, Ord. 61, r. 9). See title REAL PROPERTY AND CHATTELS REAL.

(*b*) *Ibid.*, see ss. 1, 40, 47, 50, 53, 54. Such deed must be entered on the court rolls as provided by the Act, but need not be otherwise enrolled (ss. 41, 50, 53, 54; *Honywood* v. *Foster* (No. 1) (1861), 30 Beav. 1; *Gibbons* v. *Snape* (1863), 1 De G. J. & Sm. 621; *Green* v. *Paterson* (1886), 32 Ch. D. 95, C. A.). See titles COPYHOLDS, Vol. VIII., pp. 15, 71; REAL PROPERTY AND CHATTELS REAL.

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equity or such person as aforesaid of money subject to be invested in the purchase of lands to be so settled that some person would, if the lands were purchased, have an estate tail therein is required to be made by deed (*c*).

Consent of protector of settlement to disentailing assurance.

**660.** The consent of the protector of a settlement to the disposition by way of disentailing assurance under the Fines and Recoveries Act, 1833 (*d*), by a tenant in tail or such person as aforesaid (*e*) of any hereditaments not being copyhold, or of any money subject to be invested in the purchase of lands of any tenure to be entailed, is required to be given either by the deed by which the disposition is effected or by a distinct deed (*f*); and the consent of the protector of a settlement to the disposition by way of disentailing assurance under that Act by a tenant in tail, or such person as aforesaid, of any legal estate in any copyhold hereditaments must, if not given by the surrender by which such disposition is effected, be given by deed (*g*). So also the consent of the protector of a settlement to the disposition, by way of disentailing assurance under that Act by a tenant in tail or such person as aforesaid (*h*), of any equitable estate in any copyhold hereditaments, must be given, where such disposition is effected by deed (*i*), either by such deed or by a distinct deed, and must be given by deed where such disposition is effected by surrender and such consent is not given by the surrender (*k*).

Disentailing assurances of bankrupt's land.

**661.** Dispositions by way of disentailing assurance under the Fines and Recoveries Act, 1833 (*l*), of any lands, tenements or hereditaments, corporeal or incorporeal, or any undivided share thereof, to which any bankrupt is beneficially entitled at law or in equity for an estate tail or a base fee, are required to be made by deed (*m*).

Dispositions by married women.

All dispositions, releases, surrenders, and extinguishments

(*c*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 1, 40, 47, 71. The deeds effecting such dispositions are required to be enrolled in accordance with the provisions of the Act (see s. 41; R. S. C., 1883, Ord. 61, r. 9). As to Ireland, see the Fines and Recoveries (Ireland) Act, 1834 (4 & 5 Will. 4, c. 92), s. 63.

(*d*) 3 & 4 Will. 4, c. 74. See, as to Ireland, the Fines and Recoveries (Ireland) Act, 1834 (4 & 5 Will. 4, c. 92), ss. 40—44.

(*e*) See note (*u*) on p. 365, *ante*.

(*f*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 42, 47, 71. If the consent be given by a distinct deed, such deed must be enrolled as provided by the Act (s. 46; R. S. C., 1883, Ord. 61, r. 9).

(*g*) *Ibid.*, ss. 47, 50—54. In such case the deed must be executed by the protector and produced to the lord of the manor, his steward or deputy-steward, and the deed must be entered on the court rolls, but need not be otherwise enrolled.

(*h*) See note (*u*) on p. 365, *ante*.

(*i*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 50, 53.

(*k*) *Ibid.*, ss. 42, 47, 51—54. Where the consent is given by a deed distinct from the disposition, such deed must be entered on the court rolls, but need not be otherwise enrolled. See titles COPYHOLDS, Vol. VIII., p. 15; REAL PROPERTY AND CHATTELS REAL.

(*l*) 3 & 4 Will. 4, c. 74 (see ss. 56—69, 71); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44, 56 (5). As to Ireland, see the Fines and Recoveries (Ireland) Act, 1834 (4 & 5 Will. 4, c. 92), ss. 49—61.

(*m*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 56.

authorised by the Fines and Recoveries Act, 1833 (*n*), to be made by any married woman (otherwise than as tenant in tail under that Act (*o*)) of any estate, interest or power therein mentioned are required to be made by deed (*p*).

Leases under Ecclesiastical Leasing Act, 1842.

**662.** Leases made by the incumbents of ecclesiastical benefices under the powers given by the Ecclesiastical Leases Act, 1842 (*q*), and leases made by ecclesiastical corporations under the powers given by the Ecclesiastical Leasing Act, 1842 (*r*), are required to be made by deed.

Conveyance of corporeal hereditaments. Partition, exchange, lease.

**663.** A deed is required at law (*s*) to effect the conveyance, as between living persons, of an estate of freehold in possession in any corporeal hereditaments (*t*) (except only in the case of a feoffment made by an infant under a custom); to make a partition (*u*) and an

(*n*) 3 & 4 Will. 4, c. 74. As to Ireland, see the Fines and Recoveries (Ireland) Act, 1834 (4 & 5 Will. 4, c. 92), ss. 68, 70.

(*o*) See p. 365, *ante*.

(*p*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 77. The dispositions so authorised are of any lands, tenements, or hereditaments, corporeal or incorporeal, of any tenure (other than copyholds of or to which a married woman or she and her husband in her right is or are seised or entitled for an estate at law, and which can be disposed of by her in concurrence with her husband by surrender independently of the Act), or any undivided share thereof, and of money subject to be invested in the purchase of the same, and of any legal or equitable estate, interest, charge, lien or incumbrance, which she alone or she and her husband in her right may have in or upon such hereditaments, share or money, and (as to release) of any power which may be vested in or limited or reserved to her in regard to such hereditaments, share or money, or any legal or equitable estate, interest, charge, lien or incumbrance in or affecting such hereditaments, share or money (see ss. 1, 77). Her husband must concur in the deed, which must also be duly acknowledged by her (see s. 79; Conveyancing Act, 1882 (46 & 47 Vict. c. 39), s. 7; County Courts Act, 1888 (51 & 52 Vict. 43), s. 184). See titles HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL.

(*q*) 5 & 6 Vict. c. 27, s. 1.

(*r*) 5 & 6 Vict. c. 108, s. 1.

(*s*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3.

(*t*) *Ibid.*, ss. 2, 3; *Zimbler* v. *Abrahams*, [1903] 1 K. B. 577, 581, 582, C. A. At common law, estates of freehold in possession in corporeal hereditaments were transferable, principally, by feoffment with livery of seisin; and a feoffment might well be made by word of mouth; Bract. fo. 11 b, 33 b, 38 b, 39 b; Littleton's Tenures, ss. 59, 60, 66, 214—217; Co. Litt. 48 b, 121 b, 143 a, 271 b, n. (1). By the effect of the Statute of Frauds (29 Car. 2, c. 3), s. 1, all feoffments were required to be put into writing and signed by the party making the same or his agent lawfully authorised by writing. During the 17th and 18th centuries and down to the year 1841 the regular method of conveying freehold estates in possession was by lease and release, a transaction in which two deeds were employed. From 1841 to 1845 a deed of statutory release alone was necessary. The Real Property Act, 1845 (8 & 9 Vict. c. 106), by s. 3, made feoffments void at law unless evidenced by deed, excepting only those made by infants under a custom, and by s. 2, made corporeal hereditaments transferable by deed of grant, since adopted in practice as the regular method of conveying freeholds; see Williams' Real Property, 20th ed., 143, 144, 148, 154—156, 195, 201, 209—212.

(*u*) At common law partition between co-parceners might be made, as well of incorporeal as of corporeal hereditaments, by parol agreement between them followed by entry, but without formal livery of seisin; but partition by agreement between joint tenants or tenants in common could only be carried out by mutual conveyances of their respective interests or shares. In the case of joint

SECT. 2. When a Deed is necessary.

exchange (*v*) of any tenements or hereditaments not being copyhold; and to make a valid lease of any land for any term exceeding three years from the making thereof, or for any shorter term, in respect whereof the rent reserved does not amount to two-thirds at least of the full improved value of the land (*a*). A deed is also required at law (*b*) to make a valid assignment of a chattel interest, not being copyhold, in any corporeal hereditaments (*c*); and to make a valid surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest and not being an interest which might by law have been created without writing (*d*).

Assignment of chattel interest.

Surrender.

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tenants this was properly effected by a release by deed, but tenants in common might give effect to a parol agreement for partition of corporeal hereditaments by mutual feoffments made by parol coupled with livery of seisin (Littleton's Tenures, ss. 243—246, 250, 290, 304, 318; Co. Litt. 169 a, 187 a, 192). After the Statute of Frauds (29 Car. 2, c. 3), s. 1, partition by agreement between co-parceners and feoffments giving effect to a partition between tenants in common had to be put in writing and signed by the parties making the same or their agents thereunto authorised in writing (6 Bythewood and Jarman's Conveyancing by Sweet, 587, 588).

(*v*) At common law an exchange of lands lying in the same county might be made between men of equal estate by word of mouth followed by entry, and without formal livery of seisin; but the exchange of lands lying in different counties and of any incorporeal hereditaments, wherever situate, was required to be made by deed (Littleton's Tenures, ss. 62—65; Co. Litt. 50, 51, 266 b). After the Statute of Frauds (29 Car. 2, c. 3), s. 1, exchanges of lands in the same county were required to be put in writing and signed by the parties making the same or their agents thereunto authorised in writing (4 Bythewood and Jarman's Conveyancing by Sweet, 2).

(*a*) At common law a lease of land for any term of years might well be made by word of mouth and without livery of seisin; but until the entry of the lessee he had no estate in the land by virtue of the lease, but only the interest known as *interesse termini* (Littleton's Tenures, ss. 58, 59, 459; Co. Litt. 46 b, 270 a). The Statute of Frauds (29 Car. 2, c. 3), ss. 1, 2, provided that all leases of any lands or hereditaments made by parol and not put in writing and signed by the parties making the same or their agents thereunto authorised by writing should have the effect of leases at will only; except leases not exceeding the term of three years from the making thereof, whereupon the rent reserved should amount to two-thirds at least of the full improved value of the thing demised. The Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3, made void at law all leases required by law to be in writing, unless made by deed. Lessees still have no greater interest, before entry, than an *interesse termini* (*Wallis* v. *Hands*, [1893] 2 Ch. 75; *Lewis* v. *Baker*, [1905] 1 Ch. 46).

(*b*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3.

(*c*) At common law an assignment of a chattel interest in any corporeal hereditaments might well be made by word of mouth (see Littleton's Tenures, s. 59; Co. Litt. 48 a, n. (1), 49 a, 85 a, and n. (2), 338 a; 3 Preston, Abstracts of Title, 2nd ed., 115). By the Statute of Frauds (29 Car. 2, c. 3), s. 3, no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, in any lands, tenements or hereditaments, should be assigned or surrendered unless by deed or note in writing signed by the party so assigning or his agent thereunto lawfully authorised by writing, or by act and operation of law.

(*d*) At common law a surrender of an estate of freehold or for years in any corporeal hereditaments might have been made by word of mouth, but the surrender of a like interest in any incorporeal hereditaments must have been made by deed (Co. Litt. 337 b, 338 a). The Statute of Frauds (29 Car. 2, c. 3), s. 3, required all surrenders of such estates to be put in writing and signed as above mentioned, except those made by operation of law (see previous note). It is held, however, that, if under an agreement made between a tenant of land for life or years and the immediate reversioner or remainderman in fee, the tenant give up to the other and the other take possession of the land, that is

SECT. 2. When a Deed is necessary.

Alienation of contingent interests in land.

**664.** A deed is also required (*e*) for the alienation at law between living persons of a contingent, an executory, and a future interest, and a possibility coupled with an interest (*f*), in any tenements or hereditaments of any tenure, and of a right of entry into or upon any tenements or hereditaments in England of any tenure (*g*).

Disclaimer by married woman.

**665.** A disclaimer made by a married woman under the Real Property Act, 1845 (*h*), of any estate or interest in any tenements or hereditaments in England of any tenure must be made by deed (*i*).

Leasing etc. Act (Ireland), 1855.

Leases made under the Leasing Powers Act for Religious Worship in Ireland, 1855 (*k*), are required to be made by indenture.

Dispositions under Malins Act.

All dispositions, releases, and extinguishments authorised by the Married Women's Reversionary Interests Act, 1857 (*l*), to be made by a married woman are required to be made by deed (*m*).

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equivalent to a surrender by operation of law and the transaction may be valid without deed or writing (*Thomas* v. *Cook* (1818), 2 B. & Ald. 119; *Grimman* v. *Legge* (1828), 8 B. & C. 324; *Dodd* v. *Acklom* (1843), 6 Man. & G. 672; *Lyon* v. *Reed* (1844), 13 M. & W. 285, 305, 310; *Nickells* v. *Atherstone* (1847), 10 Q. B. 944; *Phené* v. *Popplewell* (1862), 12 C. B. (N. S.) 334; *Oastler* v. *Henderson* (1877), 2 Q. B. D. 575, C. A.; *Fenner* v. *Blake*, [1900] 1 Q. B. 426).

(*e*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 6.

(*f*) At common law the interests above mentioned could not be assigned over by deed of grant, but they might be conveyed by fine operating by way of estoppel, and might be released by deed to the tenant of the freehold (*Powle* v. *Veere* (1599), Moore (K. B.), 554), or anyone entitled to a vested estate in reversion or remainder (*Lampet's Case* (1612), 10 Co. Rep. 46 b, 48; Shep. Touch. 239, 321, 322; Fearne, Contingent Remainders, 365, 548—551; 2 Preston, Abstracts of Title, 2nd ed., 93—99, 202—204; *Doe* d. *Christmas* v. *Oliver* (1829), 10 B. & C. 181). They were, however, devisable by will under stats. 32 Hen. 8, c. 1; 34 & 35 Hen. 8, c. 5 (*Jones* v. *Roe* (1789), 3 Term Rep. 88), and are devisable under the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 3 (*Ingilby* v. *Amcotts* (1856), 21 Beav. 585). And in equity an agreement made for valuable consideration to assign such an interest would be specifically enforced (*Wright* v. *Wright* (1750), 1 Ves. Sen. 409; Fearne, Contingent Remainders, 550, 551).

(*g*) This enactment does not relate to a right or title to repossess or re-enter for condition broken, but only to an original right where there has been a disseisin or where the party has a right to recover lands and his right of re-entry and nothing but that remains (*Hunt* v. *Bishop* (1853), 8 Exch. 675, 680; *Hunt* v. *Remnant* (1854), 9 Exch. 635, 640; *Crane* v. *Batten* (1854), 23 L. T. (O. S.) 220; *Jenkins* v. *Jones* (1882), 9 Q. B. D. 128, 131, C. A.). At common law such rights of entry were not assignable, but might be released by deed for the benefit of the terre tenant (Littleton's Tenures, s. 347; *Lampet's Case*, *supra*; Co. Litt. 214 a). As to the sale since the above-mentioned Act of such rights of entry, see *Jenkins* v. *Jones*, *supra*; *Kennedy* v. *Lyell* (1885), 15 Q. B. D. 491, 496; 2 Williams, Vendor and Purchaser, 773—775.

(*h*) 8 & 9 Vict. c. 106. As to Ireland, see the Fines and Recoveries (Ireland) Act, 1834 (4 & 5 Will. 4, c. 92), s. 68, authorising disclaimer.

(*i*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 7. The deed must be made with the same formalities as are necessary in the case of a deed of disposition by a married woman under the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 77, *supra*. See title HUSBAND AND WIFE.

(*k*) 18 & 19 Vict. c. 39, s. 10. As to the execution of such deeds, see p. 400, *post*.

(*l*) 20 & 21 Vict. c. 57.

(*m*) *Ibid.*, s. 1. The dispositions etc. so authorised are of any future or reversionary interest, whether vested or contingent, belonging to her or her husband in her right (without any express restraint on the alienation thereof)

SECT. 2. When a Deed is necessary.

Leases under Settled Estates Act, 1877.

All leases authorised by the court under the Settled Estates Act, 1877 (*n*), of any settled estates or of any rights or privileges over or affecting the same (*o*), and all leases authorised by the same Act to be made by tenants for life and others (*p*), are required to be made by deed.

Under Conveyancing Acts.

**666.** Under the Conveyancing and Law of Property Act, 1881 (*q*), a deed is required in the following cases:—A conveyance of any property in order that the general words, estate clause, or covenants for title or covenants against incumbrances to be implied by virtue of the Act may be incorporated therein; mortgages of any property in order to incorporate therein the powers of sale, of insurance, of appointing a receiver, and of cutting timber conferred by the Act (*r*); conveyances by mortgagees exercising the power of sale conferred by the Act (*s*); mortgages in the statutory form authorised by the Act of freehold or leasehold land (*t*); a release of or a contract not to exercise any power (whether coupled with an interest or not), if intended to take effect under the Act (*a*) and not under the law existing independently of the Act (*b*); the appointment authorised by the Act (*c*) to be made by a married woman of an attorney (*d*); and enlargements under the Act (*e*) of long terms of years (*f*). A disclaimer of a power must, in order to

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in any personal estate whatsoever to which she became entitled under any instrument (other than a settlement or an agreement for a settlement made on the occasion of her marriage) made after 31st December, 1857, and (as to release) of any power vested in or limited or reserved to her in regard to any such personal estate and of her right or equity to a settlement out of any personal estate to which she or her husband in her right may be entitled in possession under any such instrument as aforesaid. Her husband must concur in the deed, which must also be duly acknowledged by her (see ss. 1, 2, 4; note (*p*), p. 367, *ante*). See title HUSBAND AND WIFE.

(*n*) 40 & 41 Vict. c. 18.

(*o*) S. 4.

(*p*) S. 46. See title SETTLEMENTS.

(*q*) 44 & 45 Vict. c. 41, ss. 2 (v.), 6, 7 (1), (5), (7), 63. See further as to these provisions, title REAL PROPERTY AND CHATTELS REAL.

(*r*) *Ibid.*, s. 19 (1); see s. 2. See, further, title MORTGAGE.

(*s*) *Ibid.*, s. 21 (1). See, further, title MORTGAGE.

(*t*) *Ibid.*, s. 26 (1). See, further, title MORTGAGE.

(*a*) 44 & 45 Vict. c. 41.

(*b*) *Ibid.*, s. 52. The only powers which cannot be released, extinguished, or suspended independently of this enactment are powers simply collateral and powers given to married women and not capable of being released or suspended under the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 77, the Married Women's Reversionary Interests Act, 1857 (20 & 21 Vict. c. 57), or the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) (see Williams' Conveyancing Statutes, 226, 383—386; *Re Chisholm's Settlement*, [1901] 2 Ch. 82; pp. 367, 369, *ante*). See, further, title POWERS.

(*c*) 44 & 45 Vict. c. 41.

(*d*) *Ibid.*, s. 40. See, further, title HUSBAND AND WIFE.

(*e*) 44 & 45 Vict. c. 41.

(*f*) *Ibid.*, s. 65. The terms which may be so enlarged are those (whether created by lease from the freeholder or by underlease) which as originally created were for not less than 300 years, and whereof a residue of not less than 200 years is subsisting, without any trust or right of redemption affecting them in favour of the freeholder or other person entitled in reversion expectant thereon, and without any rent, or with merely a peppercorn rent or other rent having no money value incident to the reversion, or having had a rent (not being merely a

be effectual under the Conveyancing Act, 1882 (*g*), be made by deed (*h*).

Leases under Settled Land Acts.

**667.** All leases authorised by the Settled Land Acts, 1882 to 1890 (*i*), to be made by tenants for life and others of any settled land are required to be made by deed (*j*); except leases made at the best rent that can reasonably be obtained without fine and without exempting the lessee from punishment for waste for a term of not more than three years from the making thereof (*k*).

Appointment of new trustee.

**668.** An appointment of a new trustee or new trustees must be made by deed in every case in which it is intended to transfer any of the trust property by a vesting declaration under the Trustee Act, 1893 (*l*). A declaration by one of three or more trustees of his desire to be discharged under that Act (*m*) must be made by deed. A vesting declaration under that Act (*n*), if made upon the appointment of a new trustee, must be made by the deed by which the new trustee is appointed, and, if made upon the retirement under that Act of one of three or more trustees, must be made by the deed by which the retiring trustee is discharged.

The choice and appointment of a new trustee or new trustees made under the Trustees Appointment Act, 1850 (*o*), is required to be evidenced by deed (*p*).

Instruments of transfer etc. under Land Transfer Acts.

**669.** Every instrument intended to be registered under the Land Transfer Acts, 1875 and 1897 (*q*), and to effect a transfer, charge, exchange or partition of registered land, or of any registered charge thereon, or to effect any alteration of a registered charge, is required to be executed as a deed (*r*).

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peppercorn rent or other rent having no money value) which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable; but not including any term liable to be determined by re-entry for condition broken, or any term created by sub-demise out of a superior term itself incapable of being enlarged into a fee simple (see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 11).

(*g*) 45 & 46 Vict. c. 39.

(*h*) *Ibid.*, s. 6. The operative effect of this enactment mainly concerns powers simply collateral; see Williams' Conveyancing Statutes, 281. See, further, title POWERS.

(*i*) 45 & 46 Vict. c. 38; 47 & 48 Vict. c. 18; 50 & 51 Vict. c. 30; 52 & 53 Vict. c. 36; 53 & 54 Vict. c. 69.

(*j*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7; see ss. 2, 6, 8—12, 17. See title SETTLEMENTS.

(*k*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 7.

(*l*) 56 & 57 Vict. c. 53, s. 12 (1), replacing the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 34 (1), to the same effect. See, further, title TRUSTS AND TRUSTEES.

(*m*) 56 & 57 Vict. c. 53, s. 11 (1), replacing the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 32 (1), to the same effect. See, further, title TRUSTS AND TRUSTEES.

(*n*) 56 & 57 Vict. c. 53, s. 12 (1), (2), replacing the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 34 (1), (2), to the same effect. See, further, title TRUSTS AND TRUSTEES.

(*o*) 13 & 14 Vict. c. 28, s. 3. As to the execution of such deeds, see p. 399, *post*.

(*p*) It is only for the purpose of preserving evidence that the appointment is required to be made to appear by some deed. The appointment itself need not be by deed. It will be sufficient if made by writing, without seal, as the Trustees Appointment Act, 1890 (53 & 54 Vict. c. 19), s. 3 (1), extends the statutory power for the appointment of new trustees for the time being in force to all land acquired, and held on trust for any purpose to which the Trustees Appointment Act, 1850 (13 & 14 Vict. c. 28), applies.

(*q*) 38 & 39 Vict. c. 87, ss. 22, 29, 34; 60 & 61 Vict. c. 65, s. 9 (3).

(*r*) Land Transfer Rules, 1903, No. 107, Statutory Rules and Orders Revised,

SECT. 2. When a Deed is necessary.

Copyright in sculptures.

Transfers of shares etc.

**670.** The following matters are required to be carried out by deed:—Assignments of the copyright in new and original sculptures, models, copies or casts (*s*); transfers of shares in companies, which are subject to the provisions of the Companies Clauses Act, 1845 (*t*); mortgage debentures issued by companies under the Mortgage Debenture Acts, 1865 (*u*) and 1870 (*a*). An attorney to act for the purpose of making a transfer of any stock of any company or corporation, funds or annuities transferable in the books of the Bank of England or the Bank of Ireland, must be appointed by writing under the hand and seal of the stockholder (*b*).

Relinquishment of holy orders.

The relinquishment of holy orders under the Clerical Disabilities Act, 1870 (*c*), can only be effected by deed.

Contracts under Public Health Act, 1875.

**671.** Every contract made by an urban authority under the Public Health Act, 1875 (*d*), and exceeding £50 in amount or value, is required to be in writing and sealed with the common seal of such authority (*e*).

Bills of sale.

**672.** Bills of sale of personal chattels made or given by way of security for the payment of money by the grantor thereof are void unless made by deed in statutory form (*f*).

Transfers, mortgages and transfers of mortgages of British ships.

**673.** Transfers of British ships or any share therein, when made to persons qualified to own a British ship, are required (*g*) to be made by bill of sale in the form of a deed. And mortgages of British ships or any share therein and transfers of registered mortgages of British ships or any share therein are required (*h*) to be made in the form of a deed.

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Vol. VII., Land Registration, England, pp. 33—109. As to attestation of such instruments, see p. 399, *post*.

(*s*) Sculpture Copyright Act, 1814 (54 Geo. 3, c. 56), s. 4. As to the execution of such deeds, see p. 398, *post*. See, further, title COPYRIGHT, Vol. VIII., p. 207.

(*t*) 8 & 9 Vict. c. 16, s. 14; *Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555, C. A.; see Williams on Personal Property, 16th ed., 298, 299. Shares in companies registered under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 22, or the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 22, are transferable in manner provided by the articles of the company. Such transfers may be, but are not necessarily, required to be made by deed (see *Re Tahiti Cotton Co., Ex parte Sargent* (1874), L. R. 17 Eq. 273, 280; *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20, 22; *Ireland* v. *Hart*, [1902] 1 Ch. 522, 524, 527, 528. See, further, title COMPANIES, Vol. V.

(*u*) 28 & 29 Vict. c. 78, s. 26.

(*a*) 33 & 34 Vict. c. 20, s. 15. See, further, title COMPANIES, Vol. V.

(*b*) National Debt Act, 1870 (33 & 34 Vict. c. 71), ss. 22, 73. As to the attestation of such instruments, see pp. 398, 399, *post*.

(*c*) 33 & 34 Vict. c. 91, s. 3, by which enrolment and other formalities are required. See p. 399, *post*, as to the execution and attestation of such deeds. See, further, title ECCLESIASTICAL LAW.

(*d*) 38 & 39 Vict. c. 55, s. 174 (1); see ss. 5—8, 10, 12.

(*e*) *Hunt* v. *Wimbledon Local Board* (1878), 3 C. P. D. 208, 213; *Young & Co.* v. *Royal Leamington Spa Corporation* (1883), 8 App. Cas. 517; compare *Eaton* v. *Basker* (1881), 7 Q. B. D. 529, C. A.; *A.-G.* v. *Gaskill* (1882), 22 Ch. D. 537. See, further, titles LOCAL GOVERNMENT; PUBLIC HEALTH; ETC.

(*f*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9. See, further, title BILLS OF SALE, Vol. III., pp. 1 *et seq.*

(*g*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 1, 2, 24, 65 (2), and Sched. I.; *Chasteauneuf* v. *Capeyron* (1882), 7 App. Cas. 127, P. C.

(*h*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 1, 2, 31, 37, 65 (2),

**674.** Apprenticeship to the sea service is apparently required to be made by indenture (*i*).

SUB-SECT. 3.—*In Equity.*

General rule.

**675.** Whenever any question is raised (whether for the purpose of asserting some equitable right or otherwise) in any court possessing equitable jurisdiction as to the effect of any assurance or alleged assurance of some legal estate or interest in any real or personal property or other legal right, the invariable rule is that the validity of the assurance, as regards its operation to convey any such legal estate, interest or right, must be tested by the rules of common law or statute required to be observed in order that it may take effect at law. In other words, equity follows, and has always followed, the law with respect to the formalities necessary for the conveyance of any legal estate, interest or right (*k*). For example, if a claim to assert some equitable interest or right in or to any lands or goods be met with a plea of purchase of the legal estate or interest therein for value and without notice of the equitable interest or right asserted, a conveyance of such legal estate or interest must be proved which is valid at law (*l*); and in any case in which a deed is required to make the conveyance valid at law it must be shown that a deed was employed (*m*). So, also, whenever any claim is asserted in any court of equitable jurisdiction under any assurance or alleged assurance made gratuitously of any legal estate, interest or right, a conveyance thereof must be proved which is valid at law; and if a deed be required to effect such conveyance at law, the assurance is of no effect in equity without deed. It is settled that (where no declaration of trust is made) equity will not interfere to enforce or uphold a voluntary gift, which is incomplete for want of compliance with the formalities required at law, of any legal estate, interest or right (*n*). Thus, any voluntary gift made without deed (and without any declaration of trust) of any legal estate of freehold

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and Sched. I. As to the execution of such deeds, see p. 398, *post;* and see, further, title SHIPPING AND NAVIGATION.

(*i*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60); see ss. 106—109, 742 (*s. v.* "Seaman"). See, further, title SHIPPING AND NAVIGATION.

(*k*) See cases cited in notes (*l*) to (*q*), *infra;* 1 Story, Equity Jurisprudence, 13th ed. by Bigelow, s. 64, p. 60.

(*l*) See *Bassett* v. *Nosworthy* (1673), Cas. *temp.* Finch, 102, 103; *Brace* v. *Marlborough* (*Duchess*) (1728), 2 P. Wms. 491, 496; *Willoughby* v. *Willoughby* (1787), 1 Term Rep. 763, 767, 773; *Rooper* v. *Harrison* (1855), 2 K. & J. 86, 108, 109; *Phillips* v. *Phillips* (1861), 4 De G. F. & J. 208, 215, 216; *Clemow* v. *Geach* (1870), 6 Ch. App. 147; *Pilcher* v. *Rawlins* (1872), 7 Ch. App. 259; *Heath* v. *Crealock* (1874), 10 Ch. App. 22, 29, 30; *Joseph* v. *Lyons* (1884), 15 Q. B. D. 280, C. A.; *Hallas* v. *Robinson* (1885), 15 Q. B. D. 288, C. A.; *Taylor* v. *Russell*, [1892] A. C. 244, C. A.; *Bailey* v. *Barnes*, [1894] 1 Ch. 25, 36, C. A.; *Synge* v. *Synge*, [1894] 1 Q. B. 466, 471, C. A.; *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231, C. A.

(*m*) Consider the cases cited in the preceding note, and *Potter* v. *Sanders* (1846), 6 Hare, 1; *National Bank of Australia* v. *United Hand in Hand and Band of Hope Co.* (1879), 4 App. Cas. 391, 407, P. C.; *National Provincial Bank of England* v. *Jackson* (1886), 33 Ch. D. 1, C. A.

(*n*) *Colman* v. *Sarrel* (1789), 1 Ves. 50, *per* Lord ELDON, L.C., at pp. 52, 55; *Ellison* v. *Ellison* (1802), 6 Ves. 656, 662; *Antrobus* v. *Smith* (1805), 12 Ves. 39; *Edwards* v. *Jones* (1836), 1 My. & Cr. 226, 237, 238; *Dillon* v. *Coppin* (1839), 4 My. & Cr. 647; *Meek* v. *Kettlewell* (1843), 1 Ph. 342, 347, 348; *Milroy* v.

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in possession or remainder in any land (*o*), or of any legal term of years in any land (*p*), is altogether void in equity as well as at law. And a voluntary release of a debt owing at law is void, if not made by deed, both at law and in equity (*q*).

Deed not required for the creation of a trust or the assurance of any equitable interest.

Creation of trusts.

**676.** A deed is not required by the rules of equity either for the creation of any trust or for the assurance of any equitable estate or interest in any real or personal property held on trust or subject to any equity giving rise to an equitable estate or interest, such as the equity of redemption (*r*). Thus, trusts of chattels personal may well be created by word of mouth (*s*). But all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments must be manifested and proved by some writing signed by the party who is by law enabled to declare such trusts or by his last will in writing (*t*). They are not, however, required to be made by deed (*a*).

Assurances of equitable estates or interests.

**677.** All grants and assignments of any trust or confidence are required to be in writing signed by the party granting or assigning the same or by his last will (*b*). And no action can be brought upon any contract or sale of lands, tenements or hereditaments, or

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*Lord* (1862), 4 De G. F. & J. 264, C. A.; *Jones* v. *Lock* (1865), 1 Ch. App. 25, 28; *Warriner* v. *Rogers* (1873), L. R. 16 Eq. 340; *Richards* v. *Delbridge* (1874), L. R. 18 Eq. 11; *Moore* v. *Moore* (1874), L. R. 18 Eq. 474; *Heartley* v. *Nicholson* (1875), L. R. 19 Eq. 233; *Re Breton's Estate, Breton* v. *Woollven* (1881), 17 Ch. D. 416; *Re Shield, Pethybridge* v. *Burrow* (1885), 53 L. T. 5, C. A.

(*o*) *Warriner* v. *Rogers, supra;* see pp. 361, 367, *ante.*

(*p*) *Richards* v. *Delbridge, supra;* see p. 368, *ante.*

(*q*) *Edwards* v. *Walters,* [1896] 2 Ch. 157, 168, 172, C. A.; see p. 363, *ante.*

(*r*) See Perkins, Profitable Book, s. 62; Plowd. 350; Doctor and Student, Dialogue II., 17th ed., chaps. xxii. and xxiii., pp. 171, 173—175; Bacon on Uses, 13, 14, 60; Shep. Touch. 517—521; Gilbert on Uses, 3rd ed. by Sugden, 50, 70, 475; Fonblanque, Treatise on Equity, 5th ed., i., 176; ii., 21; 1 Sanders on Uses, 4th ed., 65, 210, 315, 316, 342; 9 Bythewood and Jarman on Conveyancing, 3rd ed. by Sweet, 218, n. (4th ed. by Robbins, Vol. IV., p. 460, n.); Williams on Real Property, 13th ed., 169, 437 (20th ed., 186, 187, 534, 538); Lewin on Trusts, 6th ed., 45 *et seq.*, 572 (11th ed., 51 *et seq.*, 868); 2 Davidson, Precedents in Conveyancing, 4th ed., p. 449, n.; and consider the cases cited in notes (*s*), (*a*), (*g*), (*h*), *infra.* It seems to have been a rule of the old law of uses that upon the grant of a thing which could not pass without deed, such as a rent, a use in favour of a stranger to the grant could not be raised without deed; see *Parvis* v. *Yeaton* (1614), 1 Roll. Rep. 72, 73; Vin. Abr. Uses (O. 2), pl. 3; Gilbert on Uses, 3rd ed. by Sugden, 475. It has been suggested that this rule may affect the modern law of the creation of trusts. (Lewin on Trusts, 6th ed., 46; 11th ed., 52). But it is submitted that, in modern law, a declaration of trust of any incorporeal hereditament is valid and effectual without deed, provided that s. 7 of the Statute of Frauds (29 Car. 2, c. 3) be complied with.

(*s*) *Nab* v. *Nab* (1718), 10 Mod. Rep. 404, *per* PARKER, L.C., at p. 405; *Fordyce* v. *Willis* (1792), 3 Bro. C. C. 577, *per* Lord THURLOW, L.C., at p. 587; *Bayley* v. *Boulcott* (1828), 4 Russ. 345, *per* LEACH, M.R., at p. 347; *Benbow* v. *Townsend* (1833), 1 My. & K. 506; *M'Fadden* v. *Jenkyns* (1842), 1 Hare, 458, *per* WIGRAM, V.-C., at p. 461; S. C. (1842), 1 Ph. 153, *per* Lord LYNDHURST, L.C., at p. 157; *Vandenberg* v. *Palmer* (1853), 4 K. & J. 204; *Jones* v. *Lock* (1865), 1 Ch. App. 25, *per* Lord CRANWORTH, L.C., at p. 28.

(*t*) Statute of Frauds (29 Car. 2, c. 3), s. 7; *Smith* v. *Matthews* (1861), 3 De G. F. & J. 139, C. A. S. 8 excepts trusts arising or resulting by implication or construction of law, or transferred or extinguished by operation of law.

(*a*) *Shortridge* v. *Lamplough* (1700), 7 Mod. Rep. 71, *per* HOLT, C.J., at p. 76, Ex. Ch.; and consider *Forster* v. *Hale* (1798), 3 Ves. 696, 707; *Rochefoucauld* v. *Boustead,* [1897] 1 Ch. 196, 205—207, C. A.

(*b*) Statute of Frauds (29 Car. 2, c. 3), s. 9.

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any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised (*c*). Every assurance of any equitable estate or interest in any lands, tenements, or hereditaments (*d*), or (as it appears) in any personal chattels, must therefore be so put in writing and signed (*e*); but it is not necessary that any such assurance shall be

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(*c*) Statute of Frauds (29 Car. 2, c. 3), s. 4.

(*d*) *Ibid.*, s. 9. It is thought that s. 9 of the Statute of Frauds (29 Car. 2, c. 3) applies to the assurance of an equitable estate or interest arising in any lands or hereditaments under any implied or constructive trust, such as the equitable charge created by a deposit of title deeds or any other agreement to mortgage, the purchaser's equitable estate arising under a contract to purchase land. See *Re Richardson, Shillito* v. *Hobson* (1885), 30 Ch. D. 396, C. A.; 53 L. T. 746, where it was held that an attempted oral gift of a title deed of land, which had been deposited with the donor as security for an advance, and of the money so secured, was void. KAY, J., held that the attempted gift of the money secured was void, because there had been no complete assignment at law of the mortgage debt (see note (*q*) on p. 374, *ante*); and no appeal was brought from his decision on this point. It does not appear that s. 9 of the Statute of Frauds (29 Car. 2, c. 3) was referred to, but it is submitted that it was applicable to the equitable charge attempted to be given. It seems, however, to be a question whether s. 9 of the Statute of Frauds applies to the assignment of the equitable estates or interests arising under the equity of redemption. But there appears to be no doubt that s. 4 of that Act applies to all contracts or sales of or concerning such estates or interests (see *Re Collins, Ex parte Perry* (1843), 3 Mont. D. & De G. 252; *Re Beetham, Ex parte Broderick* (1886), 18 Q. B. D. 380; so that practically this question is limited to gratuitous assurances of such estates or interests (see notes (*h*), (*i*), on p. 376, *post*). As to these, it appears to be arguable that assignments of an equity of redemption are not within s. 9 of the statute. It is true that in some early cases it was said that a mortgagee is a trustee for his mortgagor for some purposes (see *Casborne* v. *Scarfe* (1737), 1 Atk. 603, 605; *Downes* v. *Grazebrook* (1817), 3 Mer. 200, 207, 209). But this view was afterwards abandoned, and it has been repeatedly laid down that, so long as the mortgage is on foot, the mortgagee is not a trustee for, or in a fiduciary relation to, the mortgagor (*Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, *per* Lord ELDON, L.C., at pp. 183, 185, 186; *Taylor* v. *Russell*, [1892] A. C. 244, *per* Lord HERSCHELL, at p. 255; *Kennedy* v. *De Trafford*, [1896] 1 Ch. 762, C. A., *per* KAY, L.J., at p. 774; see also *Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, C. A.; *Warner* v. *Jacob* (1882), 20 Ch. D. 220). It has also been expressly held that an equity of redemption is not a "trust" within s. 10 of the same statute (*Lyster* v. *Dolland* (1792), 1 Ves. 431, 436; see *Plunket* v. *Penson* (1742), 2 Atk. 290, at p. 293). It appears that prior to the Statute of Frauds (29 Car. 2, c. 3) equitable interests were transferable by parol (see note (*r*) on p. 374, *ante*); and, apart from that statute, it is believed that there has been no legislation which alters the law in this respect. But the regular practice of conveyancers has been to make all assignments of an equity of redemption by deed, though it has been admitted that this is not necessary, and that, as regards sales, mortgages, or other contracts of or concerning an equity of redemption, a signed writing is all that is required (see 9 Bythewood and Jarman, Conveyancing, 3rd ed. by Sweet, 218, n. (4th ed. by Robbins, Vol. IV., p. 460, n.); Williams on Real Property, 13th ed., 437; 2 Davidson, Precedents in Conveyancing, 4th ed., p. 449, n.). And in practice no one could be advised to make any voluntary assurance of an equity of redemption otherwise than by deed (see note (*k*) on p. 377, *post*).

(*e*) It has been doubted whether the 9th section of the Statute of Frauds (29 Car. 2, c. 3) extends to trusts of chattels personal (see Lewin on Trusts, 6th ed., 573; 11th ed., 869); and there appears, indeed, to be some ground for the view that ss. 7—9 of this Act form one *fasciculus* of clauses relating only to lands, tenements, and hereditaments. But the point has never been decided; and s. 9 in

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evidenced by deed (*f*). There is no doubt that a deed is not necessary to the validity of any such assurance, if made for valuable consideration (*g*). And it is thought that, upon principle and according to the preponderance of authority, a deed is not necessary to effect the gratuitous assurance of any purely equitable estate, interest or right, in any real or personal property, provided that the intention of actual and immediate assignment (as distinguished from a mere promise of future assignment or gift) be clearly expressed and that the assurance be put in writing and signed by the assuror (*h*). This principle would seem also properly applicable to an express release made gratuitously of any purely equitable estate, interest or right, in any lands or goods, such as the release of an equitable charge thereon (*i*). But the

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terms applies to all trusts and makes no exception of trusts of chattels personal; and see *per* WOOD, V.-C., *Jerdein* v. *Bright* (1861), 2 John. & H. 325, 330, 331.

(*f*) See notes (*r*), (*a*), on p. 374, *ante*.

(*g*) See the authorities cited in note (*r*), p. 374, *ante*; and *Ex parte Leathes* (1833), 3 Deac. & Ch. 112; *Re Ogbourne, Ex parte Heathcoate* (1842), 2 Mont. D. & De G. 711; *Dighton* v. *Withers* (1862), 31 Beav. 423, 424; *Neve* v. *Pennell* (1863), 2 Hem. & M. 170, 186; *Tebb* v. *Hodge* (1869), L. R. 5 C. P. 73, Ex. Ch.; *Credland* v. *Potter* (1874), 10 Ch. App. 8, 12, 14. It is a general rule of equity that an agreement made for valuable consideration to assign any equitable estate or interest in any property may operate as an equitable assignment thereof; see *Row* v. *Dawson* (1749), 1 Ves. Sen. 331; *Wright* v. *Wright* (1750), 1 Ves. Sen. 409; *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. 454, *per* Lord MACNAGHTEN, at pp. 461, 462.

(*h*) See note (*d*) on p. 375, *ante*, as to a voluntary gift of an equity of redemption. It has been established by modern authority that a direct assignment may well be made, without valuable consideration, of an equitable chose in action (*Kekewich* v. *Manning* (1851), 1 De G. M. & G. 176, C. A.; *Voyle* v. *Hughes* (1854), 2 Sm. & G. 18; *Donaldson* v. *Donaldson* (1854), Kay, 711; *Gilbert* v. *Overton* (1864), 2 Hem. & M. 110; *Re Way's Trusts* (1864), 2 De G. J. & Sm. 365, C. A.; *Re Patrick, Bills* v. *Tatham*, [1891] 1 Ch. 82, C. A.—in all of which cases, though the assignment was made by deed, the point decided was that an actual assignment of, as distinguished from a mere promise to assign, an equitable interest is valid, though made gratuitously). And it has been further held that a gratuitous assignment of an equitable chose in action may be made by a signed writing without deed (*Lambe* v. *Orton* (1860), 1 Drew. & Sm. 125; *Re King, Sewell* v. *King* (1879)) 14 Ch. D. 179; *Harding* v. *Harding* (1886), 17 Q. B. D. 442; *Re Griffin, Griffin* v. *Griffin*, [1899] 1 Ch. 408); see also 3 Davidson, Precedents in Conveyancing, 3rd ed., 692, 693.

(*i*) If a voluntary gift of any equitable interest can well be made without deed, it appears to follow that a voluntary release of an equitable interest can also be made without deed. The case of *Re Hancock, Hancock* v. *Berrey* (1888), 57 L. J. (CH.) 793, may, however, be thought to make against this view. In that case there had been a mortgage by deed of an equitable reversionary chose in action. After the mortgage debt had been barred by the Statute of Limitations, the mortgagee sent the mortgage deed to the mortgagor with a letter expressing the intention of giving him the deed. There was also some slight expression of a desire on the part of the mortgagee to relinquish his claim under the mortgage; but it was considered that the letter did not amount to a transfer of the mortgagee's interest in the mortgaged property. In these circumstances it was held by KAY, J., that the mere gift of the mortgage deed did not amount to a release of the mortgagee's interest in or charge upon the mortgaged property. The learned judge said that it was necessary that a gratuitous release of the mortgage debt should be by deed. This *dictum* is no doubt correct in itself, a debt being a legal chose in action; see note (*q*), p. 374, *ante*. It is submitted, however, that the question really raised was, not whether the mortgage debt was released, but whether the mortgagee's interest (which could only be purely equitable) in the mortgaged property was released; and that the actual authority of the case is confined to the ruling

conclusive and irrevocable effect of a deed as regards any gratuitous assurance contained therein (*j*) is recognised in equity as well as at law; and any gratuitous assignment made by deed of any purely equitable estate, interest or right, is indubitably effective (*k*).

Effect in equity of contract specifically enforceable.

**678.** The equitable rule is clear that, with respect to the consequences of any act stipulated in a binding agreement to be performed, what ought to be done is to be treated as actually accomplished (*l*), and by virtue of this rule where a contract specifically enforceable is made for the acquisition of some estate or interest in real or personal property, for the assurance of which a deed is required either by common law or statute, any party to the contract, who has duly performed his part of the agreement, is entitled, as against all persons against whom the contract can be specifically enforced, to enjoy the like advantages as if the contract had been completed by the deed required (*m*).

Thus, where an enforceable contract (*n*) has been made for

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that the mere gift of the mortgage deed did not have the effect of releasing the charge. In deciding this the learned judge followed the case of *Re Richardson, Shillito* v. *Hobson* (1885), 30 Ch. D. 398, C. A. (see note (*d*), p. 375, *ante*), and declined to follow an old decision to the contrary effect (*Richards* v. *Syms* (1740), Barn. (CH.) 90, which had previously been treated as authoritative, even in the House of Lords; *Byrn* v. *Godfrey* (1798), 4 Ves. 5, 10; *Duffield* v. *Elwes* (1827), 1 Bli. (N. S.) 497, 536, 540, H. L.; *Cross* v. *Sprigg* (1849), 6 Hare, 552, 556). On one point, however, it is submitted that the decision in *Re Hancock, Hancock* v. *Berrey* (1888), 57 L. J. (CH.) 793, was wrong. The judge said that he would, if necessary, hold that the mortgage deed itself could be recovered back from the mortgagor. But it is settled that the gift and delivery of the mortgage deed by mortgagee to mortgagor passes to the latter the property in the deed considered as a piece of parchment (*Barton* v. *Gainer* (1858), 3 H. & N. 387; *Rummens* v. *Hare* (1876), 1 Ex. D. 169, C. A.; see note (*g*), p. 410, *post*). In *Re Richardson, Shillito* v. *Hobson*, *supra*, the deed purported to be given was not the mortgage deed and was not the absolute property of the donor.

(*j*) See p. 358, *ante*.

(*k*) See the cases cited in note (*h*) on p. 376, *ante*; also *Petre* v. *Espinasse* (1834), 2 My. & K. 496; *Bill* v. *Cureton* (1835), 2 My. & K. 503; *M'Donnell* v. *Hesilrige* (1852), 16 Beav. 346; *Pearson* v. *Amicable Assurance Office* (1859), 27 Beav. 229. Hence it is the invariable practice of conveyancers, when instructed to draw any voluntary settlement, assignment, release, or other assurance of any equitable estate, interest or right, to embody the parties' intention in a deed; see 3 Davidson, Precedents in Conveyancing, 3rd ed., pp. 962, 1278; Vol. V., Part II., pp. 139, 140; Encyclopædia of Forms and Precedents, Vol. II., pp. 444, 445, 448; Vol. XIII., pp. 180, 579 *et seq.*

(*l*) *Lechmere* v. *Carlisle* (*Earl*) (1733), 3 P. Wms. 211, 215; *Guidot* v. *Guidot* (1745), 3 Atk. 254, 256; *Trafford* v. *Boehm* (1746), 3 Atk. 440, 446; *Crabtree* v. *Bramble* (1747), 3 Atk. 680, 687; *Drury* v. *Buckinghamshire* (*Earl*) (1761), 2 Eden, 60, 65; *Stead* v. *Newdigate* (1817), 2 Mer. 521, 530; *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499; *Re Cary-Elwes' Contract*, [1906] 2 Ch. 143, 149.

(*m*) See the cases cited in the following notes; Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 24, 25 (11). It should be noted that, whilst equitable assignments made without deed by way of sale or mortgage of lands, tenements or hereditaments, or of shares in companies transferable by deed, are governed by the general rules of equity affecting such dispositions, similar assignments of ships or any share therein are subject to special provisions of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 57 (see *Black* v. *Williams*, [1895] 1 Ch. 408; *Barclay & Co., Ltd.* v. *Poole*, [1907] 2 Ch. 284; and title SHIPPING AND NAVIGATION); and equitable assignments of tangible goods, either absolutely or by way of mortgage, are affected by the Bills of Sale Acts, 1878 and 1882 (41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43); see title BILLS OF SALE, Vol. III., p. 13.

(*n*) For the contract, if of lands, tenements or hereditaments, or any interest

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granting a lease for life (*o*) or years (*p*) of any land or (as it appears) any incorporeal hereditament (*q*), both the landlord and the tenant thereunder are respectively entitled to enjoy and to enforce the same rights in respect of the hereditaments agreed to be demised as if the lease contracted for had actually been duly granted (*r*). But this right belongs to each of these persons as against those persons only whom he can oblige to perform the contract specifically (*s*) and in those courts only which have jurisdiction to decree such specific performance (*t*). The same doctrine applies where a landowner has for valuable consideration made an agreement in writing, duly signed (*u*), to grant the right to enter upon his land and remain there for a certain time (*a*) or to grant an easement thereover (*b*).

## SECT. 3.—*The Form of a Deed.*

### SUB-SECT. 1.—*Material on which inscribed and Mode of Inscription.*

Material on which a deed must be written.

Language; manner of writing.

**679.** A deed must be written on paper or parchment, and not on any other substance (*c*). A sealed writing inscribed on any other substance, as on wood, stone, slate, linen, cloth, leather, or steel, cannot take effect as a deed (*d*). A deed may be written in a book (*e*). It may be written in any language and in any character (*f*);

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in or concerning them, to be enforceable, the agreement, or some memorandum or note thereof, must be in writing and signed by the party to be charged therewith or some person by him thereunto lawfully authorised (Statute of Frauds (29 Car. 2, c. 3), s. 4; pp. 374, 375, *ante*; *Wills* v. *Stradling* (1797), 3 Ves. 378; *Edge* v. *Strafford* (1831), 1 Cr. & J. 391; *Webber* v. *Lee* (1882), 9 Q. B. D. 315, C. A.).

(*o*) *Zimbler* v. *Abrahams*, [1903] 1 K. B. 577, C. A.

(*p*) See *Parker* v. *Taswell* (1858), 2 De G. & J. 559; *Bond* v. *Rosling* (1861), 1 B. & S. 371; *Rollason* v. *Leon* (1861), 7 H. & N. 73; *Tidey* v. *Mollett* (1864), 16 C. B. (N. S.) 298.

(*q*) *Lowe* v. *Adams*, [1901] 2 Ch. 598, 600.

(*r*) *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, C. A.; *Furness* v. *Bond* (1888), 4 T. L. R. 457; *Lowther* v. *Heaver* (1889), 41 Ch. D. 248, 264, C. A.; *Crump* v. *Temple* (1890), 7 T. L. R. 120; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608, 617.

(*s*) See *Swain* v. *Ayres* (1888), 21 Q. B. D. 289, 293, 296, C. A. These, of course, do not include persons who have for valuable consideration and without notice of the contract acquired any legal estate or interest in the land affected (*Synge* v. *Synge*, [1894] 1 Q. B. 466, 471), C. A.

(*t*) *Foster* v. *Reeves*, [1892] 2 Q. B. 255, C. A. (where it was held that the principle did not apply in a county court in the case of a contract which by reason of the value of the property was not within the equitable jurisdiction).

(*u*) See note (*s*) on p. 362, and pp. 374, 375, *ante*.

(*a*) See *Lowe* v. *Adams*, *supra*; and title REAL PROPERTY AND CHATTELS REAL.

(*b*) See *per* LINDLEY and BOWEN, L.JJ., in *Dalton* v. *Angus* (1881), 6 App. Cas. 740, 765, 782; *May* v. *Belleville*, [1905] 2 Ch. 605; and title EASEMENTS AND PROFITS À PRENDRE.

(*c*) *Goddard's Case* (1584), 2 Co. Rep. 4 b, 5 a; Co. Litt. 35 b, 229 a; 2 Co. Inst. 672; Shep. Touch. 50, 52, 54; 2 Bl. Com. 297; Williams on Real Property, 13th ed., 153 (20th ed., 153). Mr. Preston, in his edition of Sheppard's Touchstone, pp. 50, 54, has added vellum to the substances on which a deed may be inscribed. But vellum is nothing more than a fine kind of parchment.

(*d*) Y. B. 25 Edw. 3, 83, pl. 9; Y. B. 44 Edw. 3, 21, pl. 23; Y. B. 12 Hen. 4, 23, pl. 3; Y. B. 27 Hen. 6, 9, pl. 1; Fitzherbert, Grand Abridgment, Fines, 116; Fitz. Nat. Brev. 122, I; Co. Litt. 35 b, 229 a.

(*e*) *Fox* v. *Wright* (1598), Cro. Eliz. 613.

(*f*) Shep. Touch. 55; 2 Bl. Com. 297.

and it is not necessary that the writing be done with pen and ink; it may be executed in pencil or with paint, in print, by engraving, lithography or photography, or in any other mode of representing or reproducing visible words (*g*).

SUB-SECT. 2.—*Deed Poll or Indenture.*

Deed poll.

**680.** Deeds are either deeds poll or indentures (*h*). A deed poll is a deed made by and expressing the active intention of one party only; though more persons than one may join in expressing by a deed poll the same active intention. A deed poll is so called because the parchment required for such deeds has usually been polled or shaven even at the top. An indenture is a deed to which two or more persons are parties, and which evidences some act or agreement between them other than the mere consent to join in expressing the same active intention on the part of all. An indenture derives its name from the fact that the parchment on which such a deed was written was indented or cut with a waving or indented line at the top (*i*). A deed executed before the 1st of January, 1845, is not an indenture unless it were actually indented, even though it were therein stated to be an indenture (*k*). But a deed executed after the 1st of October, 1845, and purporting to be an indenture, has the effect of an indenture, though not actually indented (*l*).

Indenture.

Who may take a benefit under a deed poll or an indenture.

**681.** Under a deed poll an assurance may be made or an obligation created by the maker of the deed to or in favour of any person sufficiently designated therein; and any such person may maintain an action upon the deed for the breach of any obligation or duty so created (*m*). A person may also take, under an indenture *inter partes*

(*g*) See *Schneider* v. *Morris* (1814), 2 M. & S. 286; *Geary* v. *Physic* (1826), 5 B. & C. 234, 237; *Bennett* v. *Brumfitt* (1867), L. R. 3 C. P. 28; *Dench* v. *Dench* (1877), 2 P. D. 60; *Tourret* v. *Cripps* (1879), 48 L. J. (CH.) 567; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 20. See, as to the greater weight to be attached to written alterations of a printed deed, *Robertson* v. *French* (1803), 4 East, 130, at p. 136; *Glynn* v. *Margetson & Co.*, [1893] A. C. 351, at pp. 354, 358.

(*h*) Littleton's Tenures, ss. 218, 370—377; Co. Litt. 35 b; Shep. Touch. 50.

(*i*) Co. Litt. 229 a, and n. (1); Shep. Touch. 50; 2 Bl. Com. 295, 296; Williams on Real Property, 13th ed., 152, 153; 20th ed., 152, 153; and see Davidson, Precedents in Conveyancing, 4th ed., Vol. I., 31, 32, 37; 3rd ed., Vol. III., Part II., 1281; 3rd ed., Vol. V., Part II., 197, 269, 279. The practice of indenting originated in early times, when deeds were short, and two or more copies were written on one piece of parchment with some words in between, and each part was cut off in a waving or uneven line, which might afterwards show that it tallied with the other part or parts. Afterwards indenting only was used (see authorities cited).

(*k*) *Stile's Case* (1596), 5 Co. Rep. 20 b; Co. Litt. 143 b, 229 a; Shep. Touch. 50. It appears, however, that a man might bind himself by executing a deed not indented, but expressed to be made between parties, in the same manner as if the deed were in the form of a deed poll (see *Salter* v. *Kidgley* (1689), Carth. 76; 1 Show. 58; Holt (K. B.), 210). And a deed actually indented might take effect as a deed poll, if not expressed to be made between parties (*Cooker* v. *Child* (1673), 2 Lev. 74).

(*l*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 5. This Act (by s. 1) repealed stat. 7 & 8 Vict. c. 76, s. 11, providing that, after 31st December, 1844, it should not be necessary in any case to have a deed indented.

(*m*) *Scudamore* v. *Vandenstene* (1587), 2 Co. Inst. 673; *Green* v. *Horne* (1694), 1 Salk. 197; *Lowther* v. *Kelly* (1723), 8 Mod. Rep. 115, 118. It is not necessary that he should be designated by name (*Sunderland Marine Insurance Co.* v.

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to which he is not named as a party, an estate in remainder (*n*), or, as it appears, by way of use or trust (*o*). And a power of attorney may be given by an indenture made *inter partes* to a person not named as a party thereto (*p*).

And under an indenture executed after the 1st of October, 1845, an immediate estate or interest in any tenements or hereditaments may be taken, although the taker be not named a party to the same indenture (*q*). The benefit of a condition or covenant respecting any tenements or hereditaments may also be taken under such an indenture by one not named a party thereto, but it is a question whether these covenants are confined to those of which the benefit may run with the land (*r*). Such covenants, however, cannot be effectually made by indenture with persons not in existence at the time of the execution of the deed, as, for instance, future owners of the land (*s*).

Execution by non-party.

**682.** It appears also that by executing an indenture a man may incur any liability therein expressed to be undertaken by him, notwithstanding that he is not named as a party to the deed (*a*). But, except in the case of such covenants respecting any tenements or hereditaments as are mentioned above, a man cannot sue at law upon any covenant contained in an indenture *inter partes* (though the covenant be expressed or appear to be made for his benefit) if he be not named as a party to the deed (*b*); though if the provisions of the deed be such as to constitute him a *cestui que trust* of the

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*Kearney* (1851), 16 Q. B. 925, 938). The same principle applies in the case of a deed indented and evidencing divers active intentions on the part of certain persons respectively, but not expressed to be made between them as parties (2 Co. Inst. 673; *Cooker* v. *Child* (1673), 2 Lev. 74).

(*n*) Co. Litt. 231 a.

(*o*) 2 Preston on Conveyancing, 394.

(*p*) *Moyle* v. *Ewer* (1602), Cro. Eliz. 905; Shep. Touch. 217; Co. Litt. 52 b, n. (4); *Lowther* v. *Kelly* (1723), 8 Mod. Rep. 115, 118; *Storer* v. *Gordon* (1814), 3 M. & S. 308, 322, 323; 2 Preston on Conveyancing, 400.

(*q*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 5. At common law a person could not take any immediate benefit under an indenture, either by way of assurance of property or right or of contract, or maintain an action upon any covenant contained therein, unless he were named as a party to the deed (Co. Litt. 231 a; 2 Co. Inst. 673; *Windsmore* v. *Hobart* (1585), Hob. 313; *Greenwood* v. *Tyler* (1620), Hob. 314; *Storer* v. *Gordon* (1814), 3 M. & S. 308, 322, 323; *Metcalfe* v. *Rycroft* (1817), 6 M. & S. 75; 2 Preston on Conveyancing, 394 *et seq.*; *Berkeley* v. *Hardy* (1826), 5 B. & C. 355; *Southampton* (*Lord*) v. *Brown* (1827), 6 B. & C. 718; *Gardner* v. *Lachlan* (1836), 8 Sim. 123, 126; *Drake* v. *Beckham* (1843), 11 M. & W. 315, 317, Ex. Ch.; *Chesterfield and Midland Silkstone Colliery Co.* v. *Hawkins* (1865), 3 H. & C. 677, 692.

(*r*) In *Forster* v. *Elvet Colliery Co., Ltd.*, [1908] 1 K. B. 629, C. A., the Court of Appeal held that they are so confined, but doubt was expressed as to this in the House of Lords; S. C., *sub nom. Dyson* v. *Forster*, [1909] A. C. 98, 102.

(*s*) *Kelsey* v. *Dodd* (1881), 52 L. J. (CH.) 34, 39; *Forster* v. *Elvet Colliery Co., Ltd.*, *supra*.

(*a*) *Salter* v. *Kidgly* (1689), Carth. 76; Holt (K. B.), 210. It seems that in this case the deed sued upon was not an indenture; see S. C., *sub nom. Salter* v. *Kidly*, 1 Show. 58; 2 Preston on Conveyancing, 418; but the rule laid down by HOLT, C.J., appears to extend to the execution of an indenture as well as of a deed made between parties but not indented.

(*b*) *Forster* v. *Elvet Colliery Co., Ltd.*, *supra*; and note (*q*), *supra*.

benefit of the agreement, he may enforce the covenant under the equitable jurisdiction of the court (*c*).

Execution in duplicate.

**683.** Where an indenture is executed in duplicate, or in more parts than one, so that each party entitled thereunder may possess an example of the deed, all the parts are regarded as one deed in law and each part is as efficacious as the other or others (*d*). Where one of such parts is executed by the grantor or assuror or person undertaking some obligation under the deed, and the other by the grantee, alienee, or person taking the benefit of such obligation, the former part is called the principal deed and the other the counterpart, but where all parties execute each part, each part is equally the principal deed (*e*).

Counterpart.

SUB-SECT. 3.—*Formal Parts*

Formal parts of a deed: date, parties, recitals, *testatum*, operative words, *testimonium*.

**684.** In modern conveyancing practice the chief formal parts of a deed are the words describing the instrument (whether deed poll or indenture), the date, the parties' names, the recitals stating the facts on which the act to be evidenced by the deed is grounded, the *testatum* or witnessing part containing the operative words which express the parties' intention, and the *testimonium* stating that the parties have sealed the deed in witness of what is written therein. Further, in assurances of property the *testatum* usually contains the following subsidiary formal parts:—The parcels or description of the property to be conveyed, the *habendum* defining the estate to be taken by the alienee, the uses (if any) declared of such estate, the trusts (if any) imposed on the person taking the legal estate under the deed, and the covenants (if any) entered into by the alienor or alienee (*f*). In a deed of feoffment or other assurance of land all that part which precedes the *habendum*, including the parties' names, the recitals (if any), and the operative words, is called the premises (*g*). There are also several formal clauses appropriate to deeds of particular kinds. Thus, mortgage deeds contain a proviso for reconveyance or redemption, leases at a rent a *reddendum* specifying the rent reserved, and frequently a proviso or condition of re-entry, and settlements a variety of trusts and powers always expressed in well-drawn deeds in formal language (*h*).

Parcels. *Habendum*.

*Reddendum*.

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(*c*) *Hook* v. *Kinnear* (undated, *circa* 1750), 3 Swan. 417, n.; *Gregory* v. *Williams* (1817), 3 Mer. 582, 590; *Page* v. *Cox* (1852), 10 Hare, 163; *Touche* v. *Metropolitan Railway Warehousing Co.* (1871), 6 Ch. App. 671, 677; *Re Empress Engineering Co.* (1880), 16 Ch. D. 125, 129, C. A.; *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290, 315, 317, C. A.; *Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89, C. A.; *Gandy* v. *Gandy* (1885), 30 Ch. D. 57, 67, 69, 70, 73—75, C. A.

(*d*) Y. B. 38 Hen. 6, 25, pl. 1; Littleton's Tenures, s. 370; Co. Litt. 229 a; Shep. Touch. 52, 53; *Pearse* v. *Morrice* (1832), 3 B. & Ad. 396; *Burchell* v. *Clark* (1876), 2 C. P. D. 88, 96, C. A.; and see p. 379, note (*i*), *ante*.

(*e*) Shep. Touch. 53; 2 Bl. Com. 296; and see cases cited in previous note.

(*f*) 1 Davidson, Precedents in Conveyancing, 4th ed., 31; 5th ed., 22; Williams on Real Property, 13th ed., 197, 198; 20th ed., 600, 601.

(*g*) Co. Litt. 6 a; 229 b; Shep. Touch. 75; 2 Bl. Com. 298.

(*h*) 2 Davidson, Precedents in Conveyancing, 4th ed., 14, 31, 305 (3rd ed., Vol. III., 1 *et seq.*, 257 *et seq.*; Vol. V., Part I., 34, 108 n. (b), 111).

SECT. 3. The Form of a Deed.

Method of framing deeds.

No stops.

Conveyancers adhere by common consent to the traditional method of framing deeds, construct them with the usual formal parts and use the established common forms; and no stops are employed in deeds, whether deeds poll or indentures (*i*). But it is not essential that a deed should be expressed in this manner. Provided that the language used in the deed express the parties' intention with reasonable certainty, it will take effect at law, notwithstanding that it be not drawn with the usual formal parts or in accordance with the established conveyancing practice (*k*). But where any rule of law requires the use of any particular or technical words to carry out the parties' intention, as in the case of the limitation of an estate of inheritance in fee simple or fee tail in any lands or hereditaments (*l*), the necessary words must of course be employed (*m*). Deeds, whether deeds poll or indentures, may be expressed either in the first or in the third person (*n*).

SUB-SECT. 4.—*Date.*

Time whence deed takes effect.

**685**. A deed takes effect from the time of its delivery, and not from the day on which it is therein stated to have been made or executed; and a party to a deed is not estopped by any statement in the deed as to the day or time of its execution from proving that it was delivered at some other time (*o*). A deed may be good although it have no date or bear a false or an impossible date (*p*).

## SECT. 4.—*Execution of a Deed.*

### SUB-SECT. 1.—*Formalities of Execution.*

#### (i.) *Sealing.*

Sealing.

**686**. A deed must be sealed, that is, it must have a seal fixed or impressed upon or attached to it, and the party professing to be bound thereby must do some act expressly or impliedly acknowledging the seal to be his (*q*). But it is not necessary that any particular kind of seal shall be used, provided that there be affixed

(*i*) 2 Davidson, Precedents in Conveyancing, 4th ed., 19, 20, 30; Williams on Real Property, 13th ed., 197—202; 20th ed., 600—605.

(*k*) Co. Litt. 7 a; 2 Bl. Com. 297, 298; *R.* v. *Wooldale* (*Inhabitants*) (1844), 6 Q. B. 549.

(*l*) Littleton's Tenures, s. 1; Williams on Real Property, 13th ed., 10, 145—147, 190; 20th ed., 110, 145—147, 201—203. See title REAL PROPERTY AND CHATTELS REAL.

(*m*) *Re Whiston's Settlement, Lovatt* v. *Williamson*, [1894] 1 Ch. 661; *Re Ethel and Mitchells and Butler's Contract*, [1901] 1 Ch. 945; *Re Irwin, Irwin* v. *Parkes*, [1904] 2 Ch. 752.

(*n*) Littleton's Tenures, ss. 371—373; Shep. Touch. 51.

(*o*) *Ludford* v. *Gretton* (1576), 2 Plowd. 490, 491; *Goddard's Case* (1584), 2 Co. Rep. 4 b; *Clayton's Case* (1585), 5 Co. Rep. 1 a; *Oshey* v. *Hicks* (1610), Cro. Jac. 263; Co. Litt. 46 b; Shep. Touch. 72; *Stone* v. *Bale* (1693), 3 Lev. 348; *Doe* d. *Whatley* v. *Telling* (1802), 2 East, 257; *Hall* v. *Cazenove* (1804), 4 East, 477; *Steele* v. *Mart* (1825), 4 B. & C. 272; *Doe* d. *Lewis* v. *Bingham* (1821), 4 B. & Ald. 672; *Browne* v. *Burton* (1847), 17 L. J. (Q. B.) 49; *Jayne* v. *Hughes* (1854), 10 Exch. 430; *Clarke* v. *Roche* (1877), 3 Q. B. D. 170; *Leschallas* v. *Woolf*, [1908] 1 Ch. 641, 651.

(*p*) *Goddard's Case, supra; Dodson* v. *Kayes* (1610), Yelv. 193; *Cromwell* v. *Grunsden* (1698), 2 Salk. 462.

(*q*) Co. Litt. 6 a; Perkins, Profitable Book, ss. 129, 130; Shep. Touch. 56, 57; *National Provincial Bank of England* v. *Jackson* (1868), 33 Ch. D. 1, 11, 14,

or impressed to or on the deed something purporting to be a seal. Thus, the seal may be of wax affixed on the deed or attached thereto by a ribbon, or it may be a wafer, or it may be simply impressed on the deed (*r*). And the seal need not bear any indication that it is the particular seal of the person who affixes it. Thus it need not be stamped with his coat-of-arms, crest, or initials, or otherwise specially marked, and in modern practice wax or wafer seals with a plain impression are generally used. One may well seal a deed with another man's seal (*s*). And where several persons are parties to a deed, it is not necessary (though it is the usual practice) that there be as many seals as there are persons, but they may all seal the deed with one and the same seal (*t*). The party sealing need not actually affix or impress the seal himself, so long as he deliver the deed in his own person (*a*), and in such case he need not touch the seal if he expressly or impliedly acknowledge it to be his (*b*). Thus, it is sufficient if the seal be affixed by some other person in his presence with his consent, and he so assents to the delivery of the deed (*c*), or if some other person in his presence and with his consent write his name opposite a seal previously affixed in token of his acknowledgment that the seal is his (*d*), or if, when the seal has been affixed by some other person in his absence on his behalf, he afterwards in person acknowledge the deed to be his (*e*). In modern practice, however, the usual manner of sealing a deed is for the party to place his finger or thumb on the seal (which is generally already attached) at the same time as he utters the words "I deliver this as my act and deed," which are equivalent to delivery (*f*)

Act of sealing.

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C. A.; *Re Balkis Consolidated Co.* (1888), 36 W. R. 392; 58 L. T. 300; *Re Smith, Oswell* v. *Shepherd* (1892), 67 L. T. 64, C. A.; and see p. 357, notes (*a*), (*d*), *ante*.

(*r*) Shep. Touch. 57; 3 Preston, Abstracts of Title, 2nd ed., 61, 62; *R.* v. *St. Paul, Covent Garden (Inhabitants)* (1845), 7 Q. B. 232, 238, 239; Sugden on Powers, 8th ed., 232; *Re Sandilands* (1871), L. R. 6 C. P. 411, 413; *National Provincial Bank of England* v. *Jackson* (1886), 33 Ch. D. 1, 11, 14, C. A.; *Re Smith, Oswell* v. *Shepherd, supra*. But a circular line enclosing the letters L. S. does not purport to be a seal; it is a mere indication of the place where the seal should be put (*Re Balkis Consolidated Co., supra*).

(*s*) Bract. fo. 38 a; Y. B. 11 Edw. 4, 4, pl. 7; Y. B. 21 Edw. 4, 81, pl. 30; Perkins, Profitable Book, ss. 130—134; *Sutton's Hospital Case* (1612), 10 Co. Rep. 1, 30 b; Shep. Touch. 57; Vin. Abr. Faits (H); *Ball* v. *Dunsterville* (1791), 4 Term Rep. 313; 3 Preston, Abstracts of Title, 2nd ed., 61, 62; *National Provincial Bank of England* v. *Jackson, supra*.

(*t*) Perkins, Profitable Book, s. 134; Shep. Touch. 57; *Lovelace's (Lord) Case* (1632), W. Jo. 268; *Ball* v. *Dunsterville, supra; Cooch* v. *Goodman* (1842), 2 Q. B. 580, at p. 598.

(*a*) Perkins, Profitable Book, ss. 130, 134; Shep. Touch. 57; 2 Bl. Com. 307. See as to delivery, p. 385, *post*.

(*b*) *Ball* v. *Dunsterville, supra; Tupper* v. *Foulkes* (1861), 9 C. B. (N. S.) 797; *Keith* v. *Pratt* (1862), 10 W. R. 296.

(*c*) *Ball* v. *Dunsterville, supra*.

(*d*) *R.* v. *Longnor (Inhabitants)* (1833), 4 B. & Ad. 647.

(*e*) *Tupper* v. *Foulkes, supra*. In these cases, where the party delivers the deed in person, authority to affix the seal, or to write his name as an acknowledgment that the seal is his, may well be given by parol (see cases last cited). But authority to execute (that is, to seal and deliver) a deed on behalf of another must be given by deed (see p. 363, *ante*).

(*f*) Williams on Real Property, 13th ed., 150; 20th ed., 150.

SECT. 4. **Execution of a Deed.**

Effect of sealing an instrument in blank

**687.** A deed must be written before it is sealed (*g*). If, therefore, a man seal and deliver a writing which is left blank in some material part (as with regard to the name of the grantor or the grantee or the description of the property to be conveyed), that is void for uncertainty and is not his deed, and it cannot be made his deed merely by filling up the blanks after his execution of it (*h*); though it may become his deed if he afterwards re-execute it (*i*). But a deed is not necessarily void for uncertainty by reason of its having been executed with some blank spaces left therein. Its language may be sufficient without filling up the blanks to ascertain the intention of the party who has executed it to do or enter into some act or agreement valid or enforceable in law (*k*); and if so the writing is his deed as it stands (*l*).

Effect of delivery before sealing.

**688.** A deed must be sealed before or at the time of its delivery (*m*); but if it be delivered without being sealed it may subsequently be sealed and re-delivered, in which case such sealing and re-delivery will be the only effective execution of the deed (*n*).

(ii.) *Signing.*

Signing not essential.

**689.** It is not essential that a deed shall be signed as well as sealed (*o*). But it is, and has long been, the regular practice for a

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(*g*) Perkins, Profitable Book, s. 118; Com. Dig. Fait (A, 1); Shep. Touch. 54; and see next note.

(*h*) *Markham* v. *Gonaston* (1598), Cro. Eliz. 626, 627; *Weeks* v. *Maillardet* (1811), 14 East, 568; *Powell* v. *Duff* (1812), 3 Camp. 181; *West* v. *Steward* (1845), 14 M. & W. 47, *per* PARKE, B., at p. 48 (where a schedule of creditors, parties to the deed, was omitted); *Hibblewhite* v. *M'Morine* (1840), 6 M. & W. 200, 215, 216; *Enthoven* v. *Hoyle* (1852), 13 C. B. 373, Ex. Ch.; *Taylor* v. *Great Indian Peninsular Rail. Co.* (1859), 4 De G. & J. 559, C. A.; *Swan* v. *North British Australasian Co.* (1862), 7 H. & N. 603; (1863) 2 H. & C. 175, Ex. Ch.; *France* v. *Clark* (1884), 26 Ch. D. 257, 263, C. A.; *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20; *Powell* v. *London and Provincial Bank*, [1893] 1 Ch. 610; affirmed [1893] 2 Ch. 555, C. A.; *Re Queensland Land and Coal Co.*, *Davis* v. *Martin*, [1894] 3 Ch. 181, 183 (the last eight cases relate to transfers of shares or debentures executed in blank); *Burgis* v. *Constantine*, [1908] 2 K. B. 484, 491—492, 497, 500, 501, C. A. (printed form of mortgage by deed of a ship with blank spaces for the necessary particulars executed by intending mortgagor and handed to the mortgagee to fill up).

(*i*) *Hudson* v. *Revett* (1829), 5 Bing. 368, 371; *Hibblewhite* v. *M'Morine*, *supra*; *Tupper* v. *Foulkes* (1861), 9 C. B. (N. S.) 797, *per* WILLIAMS, J., at pp. 807, 808; see, further, p. 403, *post*.

(*k*) See p. 357, *ante*.

(*l*) *Doe* d. *Lewis* v. *Bingham* (1821), 4 B. & Ald. 672; *Hall* v. *Chandless* (1827), 4 Bing. 123; *Hudson* v. *Revett*, *supra*; *Hibblewhite* v. *M'Morine*, *supra*, *per* PARKE, B.; *Adsetts* v. *Hives* (1863), 33 Beav. 52. Where a deed with blanks left in it is so valid, filling in the blanks after its execution constitutes an alteration of the deed, as to which see p. 411, *post*.

(*m*) *Goddard's Case* (1584), 2 Co. Rep. 4 b, 5 a; Finch, Law, Book II., c. 2, 108; Shep. Touch. 57 (Preston's ed.); and see *Davidson* v. *Cooper* (1843), 11 M. & W. 778; (1844) 13 M. & W. 343, 353, Ex. Ch.

(*n*) *Tupper* v. *Foulkes*, *supra*.

(*o*) Termes de la Ley, *sub voce* Faits; Shep. Touch. 60; *Maby* v. *Shepherd* (1622), Cro. Jac. 640; *Cromwell* v. *Grunsden* (1698), 2 Salk. 462, *per* HOLT, C.J.; *R.* v. *Goddard* (1703), 3 Salk. 171; 2 Bl. Com. 306; *Elliot* v. *Davis* (1801), 2 Bos. & P. 338; *Wright* v. *Wakeford* (1811), 17 Ves. 454, 459; *Taunton* v. *Pepler* (1820), Madd. & G. 166; 3 Preston, Abstracts of Title, 2nd ed., 61, 62; Sugden on Powers, 8th ed., 234, 235; *Tupper* v. *Foulkes*, *supra*.

person executing a deed to sign his name near the place where his seal is affixed as an acknowledgment that the seal is his and as a guarantee of authenticity (*p*). And a deed intended to operate as an exercise of a power of appointment, by the terms of which the power is exercisable by deed required to be signed and sealed by the donee of the power, should certainly, and perhaps must, be signed as well as sealed (*q*).

Deed exercising a power.

(iii.) *Delivery.*

**690.** In order to be effective a deed must be delivered as the act and deed of the party expressed to be bound thereby, as well as sealed (*r*). No special form or observance is necessary for the delivery of a deed, and it may be made in words or by conduct (*s*). In modern practice the usual form of delivering a deed is for the executing party to say, while putting his finger on the seal, "I deliver this as my act and deed" (*t*). But it is not necessary to follow this form of execution (*a*). Nor is it necessary that the deed should actually be delivered over into the possession or custody

Delivery of a deed.

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A doubt has been raised whether it is not necessary to sign a deed which gives effect to some assurance required by the Statute of Frauds (29 Car. 2, c. 3), ss. 1, 2, to be put in writing and signed by the party making the same, or his agent, as in the case of a feoffment or a lease of land for a term exceeding three years from the making (2 Bl. Com. 306; *Cooch* v. *Goodman* (1842), 2 Q. B. 580, 597, 598; see pp. 367, n. (*t*), 368, n. (*b*), *ante*). But the great preponderance of authority is certainly in favour of the opinion that the Statute of Frauds (29 Car. 2, c. 3) is aimed at assurances made by parol, and does not affect transactions carried out by deed, so that in such cases signing is unnecessary; *per* HOLT, C.J., *R.* v. *Goddard* (1703), 3 Salk. 171; Shep. Touch. 56, n. (24) (Preston's ed.); 3 Preston, Abstracts of Title, 2nd ed., 61; *Aveline* v. *Whisson* (1842), 4 Man. & G. 801; *Cherry* v. *Heming* (1849), 4 Exch. 631, 636; Williams on Real Property, 13th ed., 154; 20th ed., 154; and see *Lawrie* v. *Lees* (1880), 14 Ch. D. 249, C. A.; (1881) 7 App. Cas. 19, 27, 28, 40, where the deed was not signed by the lessor, and it appears to have been considered that the essential thing was the affixing of his seal thereto. It is, however, advisable that all deeds should be signed according to the regular practice, signature in the party's own handwriting being the means generally used in modern times to demonstrate the authenticity of any document intended to bind him; see next note; Shep. Touch. 60.

(*p*) Termes de la Ley *sub voce* Faits; 3 Preston, Abstracts of Title, 2nd ed., 62; Sugden on Powers, 8th ed., 235; Williams on Real Property, 13th ed., 154, 155; 20th ed., 154.

(*q*) See p. 395, *post.*

(*r*) See p. 357, *ante;* Y. B. 9 Hen. 6, 37, pl. 12; Plowd. 308; *Goddard's Case* (1584), 2 Co. Rep. 4 b; *Clayton's Case* (1585), 5 Co. Rep. 1 a; *Stanton* v. *Chamberlain* (1588), Owen, 95; Co. Litt. 35 b, 171 b; *Willis* v. *Jermin* (1590), Cro. Eliz. 167, *per* GAWDY, J.; Termes de la Ley *sub voce* Fait; Shep. Touch. 50, 57; 2 Bl. Com. 306; 3 Preston, Abstracts of Title, 63; *per* BAYLEY, J., *Styles* v. *Wardle* (1825), 4 B. & C. 908, 911; *Doe* d. *Garnons* v. *Knight* (1826), 5 B. & C. 671; *Hall* v. *Bainbridge* (1848), 12 Q. B. 699, 710; *Tupper* v. *Foulkes* (1861), 9 C. B. (N. S.) 797, 803; *Xenos* v. *Wickham* (1863), 14 C. B. (N. S.) 435, 473, Ex. Ch.; (1867) L. R. 2 H. L. 296, 309, 312, 320, 323; *Mowatt* v. *Castle Steel and Iron Works Co.* (1886), 34 Ch. D. 58, C. A.

(*s*) *Stanton* v. *Chamberlain, supra; Thoroughgood's Case* (1612), 9 Co. Rep. 136 b; Co. Litt. 36 a, 49 b; Shep. Touch. 57, 58; *Hall* v. *Bainbridge, supra; Tupper* v. *Foulkes, supra; Xenos* v. *Wickham, supra.*

(*t*) 3 Preston, Abstracts of Title, 2nd ed., 63; *Xenos* v. *Wickham, supra;* Williams on Real Property, 13th ed., 150; 20th ed., 150, 151; see p. 383, *ante.*

(*a*) *Tupper* v. *Foulkes, supra; Keith* v. *Pratt* (1862), 10 W. R. 296.

SECT. 4. Execution of a Deed.

of the person intended to take the benefit thereof, or of some person (other than the party to be bound by the deed) to his use (*b*); though if the party to be bound so hand over the deed that is a sufficient delivery (*c*). What is essential to delivery of the document as a deed is that the party whose deed the document is expressed to be (having first sealed it (*d*)) shall by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the provisions contained therein (*e*). It is not necessary to the execution of a deed that it should be read over by or to the executing party before or at the time of its delivery, even though he be illiterate or blind; for if he be content to dispense with so informing himself of the contents of the deed he will be estopped from averring that it is not his deed (*f*). If the sealing of a deed be proved, its delivery as a deed may be inferred, provided there be nothing to show that it was only delivered as an escrow (*g*). It appears that if several deeds conveying the same land to different persons be delivered to them simultaneously, that may operate to vest the land in them as tenants in common in equal shares (*h*).

Need not be read over.

(iv.) *Attestation.*

Attestation.

**691.** Apart from statute, it is not necessary to the validity of a deed that its execution shall be attested by any witness (*i*). But

(*b*) *Doe* d. *Garnons* v. *Knight* (1826), 5 B. & C. 671, 689—692; *Exton* v. *Scott* (1833), 6 Sim. 31; *Grugeon* v. *Gerrard* (1840), 4 Y. & C. (EX.) 119, 130; *Fletcher* v. *Fletcher* (1844), 4 Hare, 67, 79; *Evans* v. *Grey* (1882), 9 L. R. Ir. 539; *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296. As to concealment of execution, see p. 403, *post*.

(*c*) *Butler and Baker's Case* (1591), 3 Co. Rep. 25 a, 26 b; *Thoroughgood's Case* (1612), 9 Co. Rep. 136 b; *Doe* d. *Garnons* v. *Knight*, *supra*; *Xenos* v. *Wickham*, *supra*, *per* BLACKBURN, J., at p. 312.

(*d*) See p. 382, note (*g*), *ante*.

(*e*) See cases cited in notes (*s*), (*a*), on p. 385, *ante*, and (*b*), *supra*; also *Taw* v. *Bury* (1559), 2 Dyer, 167 a; *Parker* v. *Tenant* (1560), 2 Dyer, 192 b; *Shelton's Case* (1582), Cro. Eliz. 7; *Hollingworth* v. *Ascue* (1594), Cro. Eliz. 355, 356; *R.* v. *Longnor* (*Inhabitants*) (1833), 4 B. & Ad. 647, 649; *London Freehold and Leasehold Property Co.* v. *Suffield* (*Baron*), [1897] 2 Ch. 608, C. A., and compare the cases cited in notes (*o*), (*p*), on p. 387, *post*, as to delivery as an escrow. Acknowledgment of a deed already sealed, but which is in another room, may be sufficient (*Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555, C. A., at p. 566).

(*f*) *Thoroughgood's Case* (1584), 2 Co. Rep. 9 a, 9 b; *Maunxel's Case* (1584), Moore (K. B.), 182, 184; Shep. Touch. 56; *Albemarle* (*Duchess*) v. *Bath* (*Earl*) (1693), Freem. (CH.) 193, 194, S. C. *sub nom. Bath* (*Earl*) v. *Mountague* (*Earl*) (1693), 3 Cas. in Ch. 55, 56, 59, 75, 76; *R.* v. *Longnor* (*Inhabitants*) (1833), 4 B. & Ad. 647; and see *Anon.* (1684), Skin. 159, pl. 6; *Hunter* v. *Walters* (1871), 7 Ch. App. 75, *per* MELLISH, L.J., at p. 87; *Howatson* v. *Webb*, [1908] 1 Ch. 1, *per* FARWELL, L.J., at pp. 3, 4, C. A.; *Chaplin & Co., Ltd.* v. *Brammall*, [1908] 1 K. B. 233, 234, 235, C. A.; *Alliance Credit Bank of London* v. *Owen* (1908), *Times*, 27th May, 1908. See pp. 393, 405, 406, *post*.

(*g*) *Hall* v. *Bainbridge* (1848), 12 Q. B. 699, 710; *Keith* v. *Pratt* (1862), 10 W. R. 296; *Xenos* v. *Wickham*, *supra*; and consider the cases cited in note (*e*), *supra*, and in notes (*o*), (*p*), on p. 387, *post*.

(*h*) So held by WOOD, V.-C., in *Hopgood* v. *Ernest* (1865), 3 De G. J. & Sm. 116. The decision in that case was reversed in the Court of Appeal on other grounds, assuming the Vice-Chancellor's decision on the above point to be correct, but without expressing any opinion thereon.

(*i*) *Goddard's Case* (1584), 2 Co. Rep. 4 b, 5 a; *Garrett* v. *Lister* (1661), 1 Lev.

it is and has long been the practice to execute deeds in the presence of a witness or witnesses and to indorse thereon or subscribe thereto a statement that the deed has been so sealed and delivered or signed, sealed and delivered, and for the attesting witness to sign his name to such statement and to add his address and description (*j*); and in certain cases attestation by one or more witnesses is required by statute (*k*).

SUB-SECT. 2.—*Delivery as an Escrow.*

Escrow.

**692.** A deed may be delivered as an escrow (or scroll), that is, as a simple writing, not to become the deed of the party expressed to be bound thereby until some condition shall have been performed (*l*); for example, not until the grantee under a deed of conveyance on sale or mortgage or of reconveyance on discharge of a mortgage shall have paid the consideration money, or not until the person to benefit under the deed shall have executed some other deed or document as agreed with the party delivering the escrow (*m*). It is not necessary that the delivery of a deed as an escrow should be made in any special form or accompanied with any particular words. Like delivery as a deed (*n*), delivery as an escrow may be made in words or by conduct, the essential thing in the case of delivery as an escrow being that the party should expressly or impliedly declare his intention to be bound by the provisions inscribed, *not* immediately, but only in the case of and upon performance of some condition then (*o*) stated or ascertained (*p*).

Delivery as an escrow.

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25; *Keith* v. *Pratt* (1862), 10 W. R. 296; 2 Bl. Com. 307, 308, 378; 3 Preston, Abstracts of Title, 2nd ed., 71; Williams on Real Property, 13th ed., 194; 20th ed., 599.

(*j*) Co. Litt. 6 a; 2 Bl. Com. 307, 308; 3 Preston, Abstracts of Title, 2nd ed., 71; Sugden on Powers, 8th ed., 234, 235; Williams on Real Property, 13th ed., 194, 299; 20th ed., 374, 599; 1 Key and Elphinstone, Precedents in Conveyancing, 9th ed., 703, 704. It is always advisable that the execution of deeds should be attested according to the usual practice in order to preserve evidence of their execution (3 Preston, Abstracts of Title, 2nd ed., 71; Williams on Real Property, 13th ed., 194; 20th ed., 599); especially as the general rule of law is that the execution of a deed must be proved by the evidence of the attesting witness, if any (see *Call* (*Bart.*) v. *Dunning* (1803), 4 East, 53; *Doe* v. *Durnford* (1813), 2 M. & S. 62, 64; *Re Reay's Estate* (1855), 1 Jur. (N. S.) 222; *Leigh* v. *Lloyd* (1865), 35 Beav. 455; *Re Rice* (*a Person of Unsound Mind*) (1886), 32 Ch. D. 35, C. A.; Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 26, and the Criminal Procedure Act, 1865, (28 & 29 Vict. c. 18), ss. 1, 7; Taylor on Evidence, 5th ed., ss. 1637 *et seq.*, 1660; 10th ed., 1839 *et seq.*, 1862; 1 Williams, Vendor and Purchaser, 96, 97; and cases in note (*l*), *infra*. The witness must be some person who is not a party to the deed; and a statement of its execution in his presence should be written on the deed and signed by him (*Coles* v. *Trecothick* (1804), 9 Ves. 234, 251; *Freshfield* v. *Reed* (1842), 9 M. & W. 404; *Wickham* v. *Bath* (*Marquis*) (1865), L. R. 1 Eq. 17, 24, 25; *Seal* v. *Claridge* (1881), 7 Q. B. D. 516, 519, C. A.).

(*k*) See pp. 393 *et seq.*, *post*.

(*l*) Y. B. 9 Hen. 6, 37, pl. 12; Keil. (1507), 88, pl. 2; Perkins, Profitable Book, s. 138; *Perryman's Case* (1599), 5 Co. Rep. 84 a, b; Shep. Touch. 58, 59; 2 Bl. Com. 307; *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296, 323; and cases cited in note (*p*), *infra*.

(*m*) See cases cited in note (*p*), *infra*.

(*n*) See p. 385, *ante*.

(*o*) See *Doe* d. *Lloyd* v. *Bennett* (1837), 8 C. & P. 124.

(*p*) *Johnson* v. *Baker* (1821), 4 B. & Ald. 440; *Murray* v. *Stair* (*Earl*) (1823),

SECT. 4. **Execution of a Deed.**

To whom an escrow may be delivered.

**693.** For a deed to be well executed as an escrow, it need not be actually delivered into the custody of a stranger to the deed (that is, some person not being either a party to the deed or the agent of some party thereto) to keep until performance of the condition and then to deliver it over to the party intended to benefit (*a*). A deed may well be delivered as an escrow, though the party to be bound retain it in his own possession (*b*). And it may be delivered as an escrow to an attorney acting for all parties thereto (*c*); and even to the solicitor acting for the party to benefit thereunder, provided it be handed to him as the agent of all parties for the purpose of such delivery (*d*). And where several persons are parties to a deed as grantees and one of them is also the solicitor of the other grantees and of the grantor, and the deed is delivered to him, evidence is admissible to prove that it was delivered to him, not as a grantee, but in his capacity of solicitor to the grantor and as an escrow to take effect only upon the performance of some condition (*e*). But at law a deed cannot well be delivered as an escrow to the party intended to benefit thereunder, as such, because delivery of the document to him is necessarily its delivery as a deed (*f*), and any stipulation then made by word of mouth and purporting to suspend the operation of the deed until the performance of some condition would be repugnant to such delivery, and the party delivering the deed would be estopped from averring such a stipulation in contradiction of the deed (*g*).

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2 B. & C. 82; *Bowker* v. *Burdekin* (1843), 11 M. & W. 128, 147; *Nash* v. *Flyn* (1844), 1 Jo. & Lat. 162; *Gudgen* v. *Besset* (1856), 6 E. & B. 986; *Phillips* v. *Edwards* (1864), 33 Beav. 440, 445—447; *Walker* v. *Ware etc. Rail. Co.* (1865), 35 Beav. 52, 58; *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296, 311, 323; *Watkins* v. *Nash* (1875), L. R. 20 Eq. 262; *Coupe* v. *Collyer* (1890), 62 L. T. 927; *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192, 194; *London Freehold and Leasehold Property Co.* v. *Suffield* (*Baron*), [1897] 2 Ch. 608, 620—622, C. A.

(*a*) In this respect the cases cited in the four following notes have modified the rule laid down in the earlier authorities cited in note (*g*), *post*.

(*b*) *Gudgen* v. *Besset*, *supra*; *Phillips* v. *Edwards*, *supra*; *Walker* v. *Ware etc. Rail. Co.*, *supra*; *Xenos* v. *Wickham*, *supra*; and see p. 386, note (*c*), *ante*.

(*c*) *Millership* v. *Brookes* (1860), 5 H. & N. 797.

(*d*) *Watkins* v. *Nash*, *supra*.

(*e*) *London Freehold and Leasehold Property Co.* v. *Suffield* (*Baron*), *supra*, in which case, however, the court found the fact to be that the deed had been delivered unconditionally.

(*f*) See p. 386, note (*c*), *ante*.

(*g*) *Whyddon's Case* (1596), Cro. Eliz. 520; *Williams* v. *Green* (1602), Cro. Eliz. 884; *Thoroughgood's Case* (1612), 9 Co. Rep. 136 b, 137 b; *Holford* v. *Parker* (1618), Hob. 246; *Bushell* v. *Pasmore* (1704), 6 Mod. Rep. 217, 218; *Coare* v. *Giblett* (1803), 4 East, 85, *per* Lord ELLENBOROUGH, C.J., at p. 95; Co. Litt. 36 a, n. (3); Shep. Touch. 58, 59; 3 Preston, Abstracts of Title, 2nd ed., 64; *Pym* v. *Campbell* (1856), 6 E. & B. 370, *per* CROMPTON, J., at p. 374; and see *Rutland's* (*Countess*) *Case* (1604), 5 Co. Rep. 25 b, 26 a, b. It is submitted that the *dictum* of HALL, V.-C., in *Watkins* v. *Nash* (1875), L. R. 20 Eq. 262, 266 (which was made with reference to the delivery of a deed by one grantor, not to the grantee, but to a co-grantor to keep as an escrow), and the decision in *London Freehold and Leasehold Property Co.* v. *Suffield* (*Baron*), *supra*, do not go so far as to overrule the authorities here stated. There are, however, some old cases to the contrary effect (see *Wilcock* v. *Hewson* (1597), Moore (K. B.), 696; *Hawksland* v. *Gatchel* (1601), Cro. Eliz. 835; *Anon.* (1603), Noy, 50). In equity, if a sealed

Effect of delivery as an escrow.

**694.** When a sealed writing is delivered as an escrow it cannot take effect as a deed pending the performance of the condition subject to which it was so delivered; and if that condition be not performed the writing remains entirely inoperative (*h*). If, therefore, a sealed writing delivered as an escrow come, pending the performance of the condition and without the consent, fault, or negligence of the party who so delivered it, into the possession of the party intended to benefit thereunder, it has no effect either in his hands or in the hands of any purchaser from him; for until fulfilment of the condition it is not, and never has been, the deed of the party who so delivered it (*i*). When a sealed writing has been delivered as an escrow to await the performance of some condition, it takes effect as a deed (without any further delivery) immediately the condition is fulfilled, and the rule is that its delivery as a deed shall, if necessary, relate back to the time of its delivery as an

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writing were delivered as a deed (or *à fortiori* as an escrow) to a party to benefit thereunder, upon an agreement that it should not take effect until the performance of some condition, he would be restrained from enforcing it at law until the condition were fulfilled, and if the condition were not observed, the other party would be relieved from liability thereunder (*Maxwell's (Sir George) Case* (1719), 1 Eq. Cas. Abr. 20, pl. 5; *Walker* v. *Walker* (1740), 2 Atk. 98, 99; *England* v. *Codrington* (1758), 1 Eden, 169; *Underhill* v. *Horwood* (1804), 10 Ves. 209, 225; *Carew's Case* (1855), 7 De G. M. & G. 43, 52, C. A.; *Evans* v. *Brembridge* (1855), 2 K. & J. 174; (1856) 8 De G. M. & G. 100, C. A.; *Griffin* v. *Clowes* (1855), 20 Beav. 61, 65, 66; *Douglas* v. *Culverwell* (1862), 4 De G. F. & J. 20, 26, C. A.; *Luke* v. *South Kensington Hotel Co.* (1879), 11 Ch. D. 121, 125, C. A.; *Re Smith, Fleming & Co., Ex parte Harding* (1879), 12 Ch. D. 557, 564, C. A.; *Bond* v. *Walford* (1886), 32 Ch. D. 238). And since the Judicature Acts this equity may be asserted in all the courts thereby established, but not, of course, where the deed operates as a conveyance of property, against persons who have, since the delivery of the deed, acquired some legal or equitable estate or interest thereunder as purchasers for value without notice of the agreement suspending or modifying the operation of the deed (see *Phillips* v. *Phillips* (1861), 4 De G. F. & J. 208, 218; *Hunter* v. *Walters* (1871), 7 Ch. App. 75; *National Provincial Bank of England* v. *Jackson* (1886), 33 Ch. D. 1, 13, C. A.; *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192, 197; and see p. 378, *ante*, and cases cited in note (*q*)). If the deed were a bond or a covenant, such assignees of the benefit thereof would take subject to all equities existing between the parties thereto (*Athenæum Life Assurance Society* v. *Pooley* (1858), 3 De G. & J. 294; *Graham* v. *Johnson* (1869), L. R. 8 Eq. 36, 43; *Re Palmer's Decoration and Furnishing Co.*, [1904] 2 Ch. 743; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6)). It is submitted that, if a man were to deliver a deed, which purported on the face of it to be an immediate and absolute conveyance of property, to the grantee thereunder as an escrow, upon an oral agreement that it should not take effect as a deed until the payment by the grantee of some purchase or mortgage money or the performance of some other condition, he would be estopped, not only by his deed, but also by his conduct in intrusting to the grantee the custody of such a title deed (being the *indicia* of ownership), from averring the oral agreement under which the deed was to take effect as an escrow only; see *Rice* v. *Rice* (1853), 2 Drew. 73, 83—85; *King* v. *Smith*, [1900] 2 Ch. 425; *Rimmer* v. *Webster*, [1902] 2 Ch. 163, 173, 174.

(*h*) *Gudgen* v. *Besset* (1856), 6 E. & B. 986; *Phillips* v. *Edwards* (1864), 33 Beav. 440, 446, 447; *Walker* v. *Ware etc. Rail. Co.* (1865), 35 Beav. 52, 58; *Lloyds Bank, Ltd.* v. *Bullock, supra;* and see the other cases cited, p. 387, note (*p*), *ante;* and see next note.

(*i*) Y. B. 9 Hen. 6, 37, pl. 12; Perkins, Profitable Book, ss. 138, 142; Vin. Abr. Faits (M), pl. 1, 4; *Lloyds Bank, Ltd.* v. *Bullock, supra. Ex hypothesi* no case of estoppel by conduct has arisen; see p. 388, note (*g*), *ante.*

SECT. 4. **Execution of a Deed.**

The party must be capable of doing the act evidenced.

escrow (*k*). It follows that, in order that a deed delivered as an escrow may take effect, the party making it must be fully capable, at the time of its delivery as an escrow, of doing the act evidenced by the deed. Thus, if an infant were to deliver a deed of mortgage as an escrow to take effect on his attaining full age, such delivery would under the present law (*l*) be altogether void (*m*). On the other hand, where the party to be bound by the deed has in all respects full capacity to do the act to be evidenced thereby at the time of its delivery as an escrow, it will be no ground for avoiding the deed if he die or cease to be *sui juris* before the condition be performed (*n*). When a deed has been delivered to a third party as an escrow possession of the deed by the grantee is *primâ facie* evidence of the performance of the condition (*o*).

SUB-SECT. 3.—*Execution in the case of Corporations.*

Execution of the deed of a corporation.

**695.** The deed of a corporation must necessarily be sealed with its corporate seal (*p*); but, in the absence of any special and legally binding regulations to the contrary, the seal affixed to the deed of

(*k*) *Jennings* v. *Bragg* (1595), Cro. Eliz. 447; *Butler and Baker's Case* (1591), 3 Co. Rep. 25 a, 35 b, 36 a; *Perryman's Case* (1599), 5 Co. Rep. 84 a, 84 b; Shep. Touch. 59, 60; *Graham* v. *Graham* (1791), 1 Ves. 272, *per* Lord ELLENBOROUGH, C.J., at pp. 274, 275; *Coare* v. *Giblett* (1803), 4 East, 85, 94, 95; *Copeland* v. *Stephens* (1818), 1 B. & Ald. 593, 606; *Edmunds* v. *Edmunds*, [1904] P. 362, 374.

(*l*) *Thurstan* v. *Nottingham Permanent Benefit Building Society*, [1902] 1 Ch. 1, C. A.; affirmed [1903] A. C. 6.

(*m*) See note (*k*), *supra*. It is thought that for this reason (amongst others) a man cannot make a conveyance valid at law of some legal estate or property in lands or goods, which he has not, but merely expects to have, by delivering a deed, purporting to convey such estate or interest, as an escrow to take effect when such estate or interest shall have been assured to him (see 2 Williams, Vendor and Purchaser, 1135, n.). Note that in the case of *Jennings* v. *Bragg*, *supra*, what was in effect decided was that the first delivery of the deed to the stranger off the land was null and void, and was not a good delivery as an escrow, and that the only valid delivery of the deed was that made on the land. It seems obvious that the court put a benevolent construction on the facts (compare the rule laid down in *Butler and Baker's Case*, *supra*; *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296, *per* BLACKBURN, J., at p. 312). But it is equally obvious that they put this construction on the facts to avoid the effect of the rule of law (which they thus impliedly acknowledged) that a man who has no estate in land (such as a disseisee) cannot make a valid lease thereof except by estoppel (see *Stephens* v. *Eliot* (1596), Cro. Eliz. 484). Mr. Preston states that a lease made by a disseisee of land by way of escrow to take effect as a deed when he should have re-entered would be inoperative in its inception and could not be made good by a second delivery after he had re-entered, and cites *Jennings* v. *Bragg*, *supra*, in support of that proposition (2 Preston, Abstracts of Title, 2nd ed., 400). That case does not, however, support the latter part of Mr. Preston's statement, for the gist of it is that the first delivery was altogether null and void, and therefore the second might take effect as the only delivery. It is submitted that this is so, notwithstanding the statement in Co. Litt. 48 b.

(*n*) See note (*k*), *supra*; *Frosett* v. *Walshe* (1616), J. Bridg. 49, 51; *Newton* v. *Metropolitan Rail. Co.* (1861), 10 W. R. 102.

(*o*) *Hare* v. *Horton* (1833), 5 B. & Ad. 715, 728, 730.

(*p*) *Moises* v. *Thornton* (1799), 8 Term Rep. 303, 307; *Doe* d. *Bank of England* v. *Chambers* (1836), 4 Ad. & El. 410; *Ludlow Corporation* v. *Charlton* (1840), 6 M. & W. 815; *Kidderminster Corporation* v. *Hardwick* (1873), L. R. 9 Exch. 13; *Oxford Corporation* v. *Crow*, [1893] 3 Ch. 535. See, generally, as to sealing by corporations, title CORPORATIONS, Vol. VIII., pp. 309, 380.

a corporation need not bear any special emblem to indicate that it is the corporate seal, and, as in the case of execution by a natural person, any seal, even another person's, will do (*q*). In the case of a corporation having the nature of a corporation at common law (*r*), and in the absence of any special and legally binding regulations to the contrary, any deed of the corporation must be sealed at a duly constituted meeting of the corporation and in pursuance of a resolution of a majority of the members of the corporation then present that the corporate seal be affixed thereto (*s*). Such a corporation may, however, appoint and empower an attorney to execute any deed on its behalf, but in that case such appointment must be made and authority given by the deed of the corporation sealed as above mentioned (*t*). And in the case of a corporation created for trading purposes, where no particular formalities are prescribed by its constitution for the execution of its deeds, the seal may be affixed by those persons to whom is intrusted the management of its affairs (*a*).

Corporation at common law.

Trading corporation.

**696.** The deed of a corporation, equally with that of a natural person (*b*), requires to be delivered as well as sealed (*c*), and may be delivered as an escrow (*d*). And the principles on which it will be determined whether a writing sealed by a corporation was delivered as a deed or as a mere escrow and the rules as to the effect of delivery as an escrow are the same as those applicable to the case of a natural person (*e*).

Delivery of the deed of a corporation.

(*q*) *Sutton's Hospital Case* (1612), 10 Co. Rep. 23 a, 30 b; Shep. Touch. 57; p. 383, *ante*.

(*r*) Corporations having the nature of a corporation at common law may be created by Act of Parliament, that being one of the regular ways recognised by the common law of creating corporations. Such corporations must be distinguished from corporations which have been created by or under statutory authority for particular purposes, and of which the powers are limited by the purpose of their origin; see *Wenlock (Baroness)* v. *River Dee Co.* (1883), 36 Ch. D. 675, *per* BOWEN, L.J., at p. 685, n, C. A.; 2 Williams, Vendor and Purchaser, 852, 855, and n. (x), 856—860, 865—870.

(*s*) Bac. Abr. Corporations (E, 3, 7, 8); *Merchants of the Staple of England (Mayor etc.)* v. *Bank of England (Governor & Co.)* (1887), 21 Q. B. D. 160, 165, 166, C. A.

(*t*) *Kidderminster Corporation* v. *Hardwick* (1873), L. R. 9 Exch. 13, 18, 24; *Oxford Corporation* v. *Crow*, [1893] 3 Ch. 535, 539.

(*a*) *Re Barned's Banking Co., Ex parte Contract Corporation* (1867), 3 Ch. App. 105, 116. See title COMPANIES, Vol. V.

(*b*) See p. 385, *ante*.

(*c*) *Per* CHOKE, J., Y. B. 9 Edw. 4, 39 b; Bro. Abr. Corporations and Capacities, pl. 72; *Willis* v. *Jermin* (1590), Cro. Eliz. 167; S. C., 2 Leon. 97; *Good* v. *Ash* (1674), 3 Keb. 307, *per* HALE, C.J.; S. C., *Anon.* (1675), 1 Vent. 257; *Derby Canal Co.* v. *Wilmot* (1808), 9 East, 360; *Mowatt* v. *Castle Steel and Ironworks Co.* (1886), 34 Ch. D. 58, C. A.; *Merchants of the Staple of England (Mayor etc.)* v. *Bank of England (Governor & Co.)*, *supra*. The *dictum* to the contrary of FRY, J., in *Gartside* v. *Silkstone and Dodworth Coal and Iron Co.* (1882), 21 Ch. D. 762, 768, appears inconsistent with the above authorities and with his own concurrence in the judgment of the C. A. in the subsequent case of *Mowatt* v. *Castle Steel and Ironworks Co.*, *supra*.

(*d*) *Derby Canal Co.* v. *Wilmot*, *supra*; *Merchants of the Staple of England (Mayor etc.)* v. *Bank of England (Governor & Co.)*, *supra*, *per* WILLS, J.; *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192, 196; *London Freehold and Leasehold Property Co.* v. *Suffield (Baron)*, [1897] 2 Ch. 608, 620—622, C. A.

(*e*) See cases cited in notes on pp. 387—390, *ante*.

SECT. 4. **Execution of a Deed.**

Execution of deed by corporation.

**697.** The deed of a corporation having the nature of a corporation at common law must be delivered at a duly constituted meeting of the corporation and in pursuance of a resolution of the majority of the members then present, or else by attorney, the attorney being thereunto authorised by the corporation's deed duly executed (*f*). But, as in the case of a natural person's deed, the delivery of a deed by a corporation will be inferred, if it be proved to have been duly sealed, provided that there were no circumstances to show that it was delivered as a mere escrow (*g*). Where by the constitution of a corporation any special mode of execution of its deeds is prescribed, or any particular formality is required to be observed in affixing the corporate seal, every deed of the corporation must, in order to be completely binding, be executed in the manner or with every formality so prescribed (*h*). Thus the deeds of companies incorporated under the Companies Act, 1862 (*i*), or the Companies (Consolidation) Act, 1908 (*j*), must be executed with the formalities (if any) (*k*) prescribed by the company's articles of association. And if, for example, the articles provide that every deed to be executed on behalf of the company shall be signed by three at least of the directors and countersigned by the managing director, the company's deeds must be so executed (*l*). So also the deeds of building societies incorporated under the Building Societies Act, 1874 (*m*), and of societies incorporated under the Industrial and Provident Societies Act, 1893 (*n*), must be executed as required by the rules of the society. Where, however, it appears on the face of a deed executed under the common seal of some corporation that the transaction thereby evidenced is within the powers of the corporation, and that all the particular formalities (if any) prescribed by the constitution of the corporation for the execution of its deeds have been duly observed, but owing solely to some irregularity, which is a matter of the internal management of the corporation, the deed is not indefeasibly binding, the corporation will be estopped from averring the defect of internal management as a reason for avoiding the deed as against any person claiming thereunder as a purchaser for value in good faith and without notice of the defect (*o*). A

Deeds of companies.

Of building or industrial and provident societies.

(*f*) See notes (*s*), (*t*), on p. 391, *ante*.

(*g*) *Merchants of the Staple of England* (*Mayor etc.*) v. *Bank of England* (*Governor & Co.*) (1887), 21 Q. B. D. 160, C. A., *per* WILLS, J.; and see note (*g*), p. 386, *ante*.

(*h*) *Clarke* v. *Imperial Gas Co.* (1832), 4 B. & Ad. 315, 324—326; *Ernest* v. *Nicholls* (1857), 6 H. L. Cas. 401, *per* Lord WENSLEYDALE, at pp. 418—422; *D'Arcy* v. *The Tamar, Kit Hill and Callington Rail. Co.* (1867), L. R. 2 Exch. 158.

(*i*) 25 & 26 Vict. c. 89.

(*j*) 8 Edw. 7, c. 69. See First Schedule, Table A, art. 76.

(*k*) See *Re Barned's Banking Co., Ex parte Contract Corporation* (1867), 3 Ch. App. 105, 116. See title COMPANIES, Vol. V.

(*l*) *Re County Life Assurance Co.* (1870), 7 Ch. App. 288, 293; and see note (*o*), *infra*. In such cases the directors subscribe the deed as a part of its execution, and do not sign it as witnesses attesting its execution (*Shears* v. *Jacob* (1866), L. R. 1 C. P. 573; *Deffell* v. *White* (1866), L. R. 2 C. P. 144).

(*m*) 37 & 38 Vict. c. 42, ss. 9, 16 (10).

(*n*) 56 & 57 Vict. c. 39, ss. 10, 21, 36, 37; and Second Schedule, No. 11.

(*o*) *Clarke* v. *Imperial Gas Co., supra; Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327, 332; *Agar* v. *Athenæum Life Assurance Society* (1858), 3 C. B. (N. S.) 725; *Re Athenæum Society, Ex parte Eagle Co.* (1858),

corporation is not estopped from averring that its common seal has been affixed to a deed fraudulently or in such circumstances as to amount to forgery, even though the deed be sealed with the true corporate seal and the same were affixed (without authority) by the person intrusted with its custody (*p*).

Seal of company, and of industrial and provident or building society.

Every limited company incorporated under the Companies Act, 1862 (*q*), or the Companies (Consolidation) Act, 1908 (*r*), and every society incorporated under the Industrial and Provident Societies Act, 1893 (*s*), is required to have its name engraven in legible characters on its seal; and the use by any director, manager, officer, or other person on behalf of such a company, or by any officer or other person on behalf of such a society, of any seal purporting to be a seal of the company or the society (as the case may be), whereon its name is not so engraven, renders him liable to a fine of £50. The seal of every building society incorporated under the Building Societies Act, 1874 (*t*), is required to bear the registered name of the society. But it does not appear that the effect of sealing a deed on behalf of such a company or society with some other seal than is so prescribed is to render the deed void (*u*).

SUB-SECT. 4.—*Execution in various Special Cases.*

Bills of sale. Assurances to charitable uses.

**698.** Bills of sale of personal chattels and assurances of any hereditaments or of personal estate (not being stock in the public funds) to be laid out in the purchase of any hereditaments to or for the benefit of any charitable uses are required to be executed with special formalities, which are dealt with elsewhere (*v*).

Deeds of blind or illiterate men.

**699.** When a deed is to be executed by a blind or an illiterate man it should first be correctly read over or fully and accurately explained to him; and he cannot be required to execute it until it has been so read or explained to him (*w*). If it be falsely read over or explained to him in some particular going to the root of the matter, that is, to the substance of the whole consideration, he will not be bound thereby (*x*). But if he execute it without requiring it to be read over or explained to him, he will be estopped from averring that it is not his deed (*y*).

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4 K. & J. 549, 561; *Mahony* v. *East Holyford Mining Co.* (1873), L. R. 7 H. L. 869, 893, 894; *County of Gloucester Bank* v. *Rudry Merthyr etc. Co.*, [1895] 1 Ch. 629; *Re Bank of Syria*, [1900] 2 Ch. 272, 278; [1901] 1 Ch. 115, 121; *Duck* v. *Tower Galvanizing Co., Ltd.*, [1901] 2 K. B. 314.

(*p*) *Bank of Ireland* v. *Evans' Charities* (*Trustees*) (1855), 5 H. L. Cas. 389; *Merchants of the Staple of England* (*Mayor etc.*) v. *Bank of England* (*Governor & Co.*) (1887), 21 Q. B. D. 160, C. A.; *Ruben* v. *Great Fingall Consolidated*, [1904] 2 K. B. 712, C. A.; [1906] A. C. 439.

(*q*) 26 & 27 Vict. c. 89, ss. 41, 42.

(*r*) 8 Edw. 7, c. 69, s. 63 (1) (b), 3.

(*s*) 56 & 57 Vict. c. 39, ss. 12, 21, 66.

(*t*) 37 & 38 Vict. c. 42, ss. 9, 16 (10).

(*u*) See *Gray* v. *Lewis* (1869), L. R. 8 Eq. 526, 531; *Wright* v. *Horton* (1887), 12 App. Cas. 371, 377, 380, 384; *H. E. Randall, Ltd.* v. *British and American Shoe Co.*, [1902] 2 Ch. 354, 358; Pollock on Contract, 7th ed., 148; and p. 391, note (*q*), *ante*.

(*v*) As to the execution of bills of sale, see title BILLS OF SALE, Vol. III., p. 45; and as to assurances for charitable uses, see title CHARITIES, Vol. IV., p. 129.

(*w*) *Thoroughgood's Case* (1584), 2 Co. Rep. 9 a, 9 b.

(*x*) *Ibid.*; see p. 405, *post*.

(*y*) See p. 386, note (*f*), *ante*.

SECT. 4. Execution of a Deed.

Deeds executed on behalf of a lunatic.

**700.** A deed executed on behalf of a lunatic or any person to whom Part IV. of the Lunacy Act, 1890 (*z*), applies, either by the committee of his estate or any other person approved by the judge or master in lunacy for the purpose, must be executed in the name of the lunatic (*a*).

Deeds executed by attorney.

**701.** Where a deed is to be executed by attorney, the attorney must be thereunto authorised by deed executed by the principal (*b*). An attorney so authorised may execute the deed on behalf of the principal, either in the principal's name and with the principal's seal and (where necessary) signature (*c*) (which is the regular way (*d*)), or else in his own name and with his own seal and signature (*e*). But the deed must be so expressed that it is apparent that the act evidenced thereby is the act of the principal and not of the attorney, and if the deed be an indenture the principal, and not the attorney, must be named as a party thereto, in order that the principal may enjoy the advantages given by law to parties only to the deed (*f*).

Warrant of attorney to confess judgment.

**702.** Deeds containing a warrant of attorney to confess judgment in any personal action or a *cognovit actionem* must be executed in the presence of a solicitor of the Supreme Court acting on behalf of the person giving the warrant or *cognovit* and attending at his request to inform him of the nature and effect of such warrant or *cognovit* before the same is executed, and such solicitor must subscribe his name as a witness to the due execution thereof, and must thereby declare himself to be the solicitor for the person executing the same and state that he subscribes as such solicitor; otherwise the warrant or *cognovit* will not be of any force (*g*).

Deeds exercising powers.

**703.** Where any instrument conferring a power of appointment provides that the power shall be exercisable by deed to be executed with some further or other formality than is required by the general law applicable to the execution of deeds (*h*), a deed exercising

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(*z*) 53 & 54 Vict. c. 5 (see s. 116).

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 124, as amended by the Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 27 (1); see *Lawrie* v. *Lees* (1880), 14 Ch. D. 249, C. A.; (1881) 7 App. Cas. 19; and p. 385, note (*o*), *ante*. See title LUNATICS AND PERSONS OF UNSOUND MIND.

(*b*) See p. 363, note (*h*), *ante*.

(*c*) See pp. 384, 385, *ante*.

(*d*) 1 Davidson, Precedents in Conveyancing, 4th ed., pp. 43, 476, n.; *ibid.*, 5th ed., pp. 101, 102, 388, n. Before the year 1882 this was the only way of well executing a power of attorney (*Combes's Case* (1613), 9 Co. Rep. 75 a, 76 b, 77 a; *Frontin* v. *Small* (1726), 2 Ld. Raym. 1418; *White* v. *Cuyler* (1795), 6 Term Rep. 176; *Wilks* v. *Back* (1802), 2 East, 142; *Berkeley* v. *Hardy* (1826), 5 B. & C. 355, 356, 357; *Lawrie* v. *Lees* (1880), 14 Ch. D. 249, C. A.; (1881) 7 App. Cas. 19.

(*e*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 46.

(*f*) *Frontin* v. *Small*, *supra*; *White* v. *Cuyler*, *supra*; *Berkeley* v. *Hardy*, *supra*. See p. 380, *ante*; 1 Davidson, Precedents in Conveyancing, 4th ed., 43, 476, n.; 5th ed., 101, 102, 388, n.

(*g*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 24, as modified by the effect of the Judicature Acts, 1873 and 1875 (36 & 37 Vict. c. 66, s. 87; 38 & 39 Vict. c. 77, s. 14); see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 905, 907; and as to warrants of attorney and *cognovits*, Williams on Personal Property, 16th ed., 209—211, and n. (z); 2 Davidson, Precedents in Conveyancing, 4th ed., Part II., 25 and n. (x).

(*h*) See pp. 382—387, *ante*.

the power may be executed either (1) in strict compliance with all the requirements of the instrument creating the power, or else (2) in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested (*i*). But to operate as a valid execution of the power it must be executed with all the formalities prescribed by one of these two methods of execution (*i*). And the second method of execution only excuses exact compliance with the terms of the instrument creating the power in so far as that instrument requires the actual execution and attestation of the deed exercising the power to be accomplished in some other or more formal manner than is required by the general law; it does not operate to defeat any direction in that instrument that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed to give validity to any appointment under the power having no relation to the mode of executing and attesting the deed exercising the power (*k*).

Deed required to be attested.

Thus, a deed exercising a power of appointment which was made exercisable by deed to be executed in the presence of and attested by a witness must be so executed and attested, or it will not be a good execution of the power (*l*). And a deed exercising a power of appointment which was made exercisable by deed to be executed in the presence of and attested by two or by any greater number of witnesses must be executed in the presence of and attested by two witnesses at least, or it will not be a good execution of the power (*m*).

Deed required to be signed.

Where the instrument creating a power makes it exercisable by deed to be signed by the person exercising the power, any deed purporting to exercise the power should certainly, and perhaps must, be signed by such person as well as sealed (*n*).

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(*i*) *Holmes* v. *Coghill* (1802), 7 Ves. 499, *per* GRANT, M.R., at p. 506; *Hawkins* v. *Kemp* (1803), 3 East, 410, 439, 440; *Reid* v. *Shergold* (1805), 10 Ves. 370, 380; Sugden on Powers, 8th ed., 206 *et seq.*; Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 12; Williams on Real Property, 13th ed., 298—300; 20th ed., 374, 375. The defective execution of a power will, however, be aided, even against purchasers from those claiming in default of appointment, if the intended appointee were a purchaser from or the wife or a child or a creditor of the person, who purported to exercise the power, or if the appointment purported to be made were for a charitable purpose (Sugden on Powers, 8th ed., 533—536, 542). But this relief is only granted to remove defects regarded as not being of the essence of the power, such as the absence of a seal or a witness or witnesses (Sugden on Powers, 8th ed., 548 *et seq.*).

(*k*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 12. See further, as to the execution of powers, title POWERS.

(*l*) *Bath* (*Earl*) v. *Mountague* (*Earl*) (1693), 3 Cas. in Ch. 55, 65, 70, 72, 86; S. C., *sub nom. Albemarle* (*Duchess*) v. *Bath* (*Earl*) (1693), Freem. (CH.) 193; *Hawkins* v. *Kemp*, *supra*; Sugden on Powers, 8th ed., 206, 207. But it may be attested by more witnesses than one (Sugden on Powers, 8th ed., 247).

(*m*) See the three previous notes.

(*n*) See Sugden on Powers, 8th ed., 207, 208, 232. It is doubtful whether in this case signature can be omitted in reliance on the terms of the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 12 (see notes (*i*), (*k*), *supra*), as that enactment requires the deed to be executed in the manner in which deeds are ordinarily executed. At the date of the passing of that Act deeds were, as they still are, ordinarily executed by the parties signing their names opposite to their seals in acknowledgment that the seals are theirs and as a guarantee of authenticity, though such signature was not necessary to the validity of the execution

SECT. 4. Execution of a Deed.

Attestation clause to deeds exercising powers.

**704.** Where deeds exercising powers are required by the instrument creating the power to be executed with some additional formality besides sealing and delivery to be performed in the presence of a witness or witnesses, and are also required to be attested, then, if it be proposed to execute the deed in strict compliance with the terms of the power (*o*), the attestation clause should expressly state that every formality required to be performed has been duly gone through in the presence of the proper number of witnesses (*p*). In such case, if the instrument creating the power require two or more formalities to be observed and the attestation clause state only that one of them has been complied with, the power is not well executed (*q*). But if the circumstances are such that, although the attestation clause expressly mentions the observance of some or one only of the formalities required, it must necessarily be inferred that all the formalities were duly gone through, the power is sufficiently executed (*r*). And if the terms of the attestation are general, purporting simply to bear witness to the execution of the deed without specifying in particular the manner of such execution or stating any of the formalities then observed, it will be implied that the required formalities were duly performed, and the power will be well executed (*s*). And where such a deed is executed in reliance on the provisions of the Law of Property Amendment Act, 1859 (*t*), the power is well executed if the attestation clause be expressed in the form in which deeds are ordinarily attested (*a*).

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of the deed (see pp. 384, 385, *ante*). And if it be answered that "the manner in which deeds are ordinarily executed" must refer to the observance of the necessary formalities only, and that at common law signing is no part of the execution of a deed, it might be contended in reply that signing is an act "having no relation to the mode of executing the deed exercising the power," and is therefore expressly excluded from the aid afforded by the enactment in question (see p. 395, *ante*). On the other hand, it appears that the chief object of this enactment was to abolish all difficulties attendant upon the execution of deeds exercising powers and required to be signed (see Sugden on Powers, 8th ed., 234—247).

(*o*) See p. 394, *ante*.

(*p*) See Sugden on Powers, 8th ed., 234—238, 245, 247, and next note.

(*q*) *Wright* v. *Wakeford* (1811), 17 Ves. 454; S. C. (1812) 4 Taunt. 213; *Doe* d. *Mansfield* v. *Peach* (1814), 2 M. & S. 576; *Wright* v. *Barlow* (1815), 3 M. & S. 512; *Vincent* v. *Sodor and Man* (*Bishop*) (1851), 4 De G. & Sm. 294, 307; see Sugden on Powers, 8th ed., 234—238, 244—247.

(*r*) *Re Wrey's Trust* (1850), 17 Sim. 201; *Vincent* v. *Sodor and Man* (*Bishop*), *supra*; *Smith* v. *Adkins* (1872), L. R. 14 Eq. 402; and see Farwell on Powers, 2nd ed., 135.

(*s*) *Burdett* v. *Spilsbury* (1843), 10 Cl. & Fin. 340, H. L.; and see Sugden on Powers, 8th ed., 240, 241; Farwell on Powers, 2nd ed., 135.

(*t*) 22 & 23 Vict. c. 35; see p. 395, note (*i*), *ante*.

(*a*) The old-established common form of attestation of a deed expresses only that it was sealed and delivered in the presence of the subscribing witness or witnesses (Sugden on Powers, 8th ed., 234, 235). Where by the instrument creating a power the deed exercising it is required to be signed, sealed, and delivered in the presence of and attested by two or more witnesses, it appears that it is not now necessary that the attestation of the deed should expressly state that the deed was so signed as well as so sealed and delivered (see Sugden on Powers, 8th ed., 234—247; Williams on Real Property, 13th ed., 298—300; 20th ed., 374, 375). But in such cases it is decidedly preferable that the

Conveyances of land in England.

**705.** Deeds evidencing any conveyance of any real property, corporeal or incorporeal, or chattel real situate in England, must, wherever executed, be executed in accordance with the law of England; but they are not required, if executed out of England, to be executed with any further or other formality than would be necessary if they were executed in England (*b*).

Conveyances of chattels personal situate in England.

**706.** It appears that deeds evidencing any conveyance of any chattel personal, corporeal or incorporeal, which according to English law is situate in England must, wherever executed, be executed with the particular formalities, if any, required by the law of England for the transfer of the property thereby assured, and are not required if executed out of England to be executed with any further or other formalities than would be necessary if they were executed in England (*c*). But if the conveying party be domiciled out of England, it seems that his capacity to make the conveyance, and consequently the validity of the conveyance, will be determined by the law of the place of his domicil. And subject to the rules that a conveyance of any personal chattel situate in England is valid if made in accordance with English law, and that such a chattel, if subject by English law to any special mode of transfer, can only be conveyed in the manner so prescribed (*c*), it appears that a conveyance of such a chattel is valid in England if it be executed in accordance with the law of the place where the conveying party is domiciled (*d*).

Deeds containing a contract to be enforced in England.

**707.** Deeds by which the parties enter into any contract to be enforced in England must, wherever executed, be executed with the particular formalities, if any, required by English law (*e*), and if executed out of England must, in addition, be executed with all the formalities which by the law of the place where the deed is executed are essential to the validity (under that law) of the contract (*f*). Where the contract operates both to create an

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attestation clause should also state the signing. Indeed, the old common form of attestation of deeds is now usually replaced by a form stating signature as well as sealing and delivery (see Encyclopædia of Forms, Vol. XIV., 237—242; 1 Key and Elphinstone, Precedents in Conveyancing, 9th ed., 703, 704).

(*b*) See *Dundas* v. *Dundas* (1830), 2 Dow & Cl. 349, H. L.; Westlake, Private International Law, 4th ed., 203, 204; Dicey, Conflict of Laws, 2nd ed., 500 *et seq.*; Encyclopædia of Forms and Precedents, Vol. XIV., p. 217.

(*c*) *City Bank* v. *Barrow* (1880), 5 App. Cas. 664, 668, 677, 683; *Re Queensland Mercantile and Agency Co., Ex parte Australasian Investment Co., Ex parte Union Bank of Australia*, [1891] 1 Ch. 536, 545; [1892] 1 Ch. 219, C. A.; *Alcock* v. *Smith*, [1892] 1 Ch. 238, 267, 268, C. A.; *Inglis* v. *Robertson*, [1898] A. C. 616, 626; *Re Maudslay, Sons and Field, Maudslay* v. *Maudslay, Sons and Field*, [1900] 1 Ch. 602, 610; *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87, C. A.; see Westlake, Private International Law, 4th ed., 192—201; Dicey, Conflict of Laws, 2nd ed., 518—528.

(*d*) See *Liverpool Marine Credit Co.* v. *Hunter* (1868), 3 Ch. App. 479, *per* Lord CHELMSFORD, L.C., at p. 483; *Lee* v. *Abdy* (1886), 17 Q. B. D. 309; *Viditz* v. *O'Hagan*, *supra*; Dicey, Conflict of Laws, 2nd ed., 524—528.

(*e*) *Leroux* v. *Brown* (1852), 12 C. B. 801.

(*f*) *Alves* v. *Hodgson* (1797), 7 Term Rep. 241, 243; *Clegg* v. *Levy* (1812), 3 Camp. 166, *per* Lord ELLENBOROUGH, C.J., at p. 167; *Richards* v. *Goold* (1827), 1 Mol. 22, 24; *Trimbey* v. *Vignier* (1834), 1 Bing. (N. C.) 151, 160; *Kent* v. *Burgess* (1840), 11 Sim. 361, 376; *Benham* v. *Mornington* (1846), 3 C. B. 133,

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obligation binding on the contractor personally and also to effect an assurance of some estate, interest, or right in, to, or over property situate in England (as in the case of a mortgage), and the deed is executed out of England, it is not certain whether it is necessary, in respect of the assurance of the property, that the deed should be executed with the formalities essential by the law of the place where the deed is executed to the validity of the contract as well as those required by the law of England; though it appears upon principle that the only formalities necessary, as regards the assurance of the property, should be those required by English law (*g*).

Deeds assuring any property situate or containing any agreement to be enforced out of England.

**708.** Deeds containing any assurance of any property situate or containing any agreement to be enforced or proved in any country, State, colony, or place out of England must be executed (whether in or out of England) in the manner required by the law of the place where such property is situate or such agreement is to be enforced or proved (*h*). For this purpose, however, such law includes the law of that place as to the conflict of laws (*i*); and it may be that under such law no other formalities are necessary in certain cases, *e.g.*, where the deed is executed in England and evidences a contract, than are prescribed by the law of England.

Assignment of copyright in sculptures.

**709.** Deeds containing an assignment of the copyright in new and original sculptures, models, copies, or casts must be signed by the assigning proprietor or proprietors with his or their own hand or hands in the presence of and attested by two or more credible witnesses (*k*).

Transfers, mortgages and transfers of mortgages of British ships.

**710.** Bills of sale of a registered ship or any share therein, when made to a person qualified to own a British ship (*l*), are required to be executed by the transferor in the presence of and to be attested by a witness or witnesses (*m*); and registered mortgages and transfers of registered mortgages of registered ships or any share therein (*n*) are apparently required to be executed by the mortgagor or transferor in the presence of and to be attested by a witness or witnesses (*o*).

Power of attorney to transfer bank stock.

**711.** A deed appointing an attorney to transfer any stock of any company or corporation, funds or annuities, transferable in the

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140; *Bristow* v. *Sequeville* (1850), 5 Exch. 275, *per* ROLFE, B., at p. 279; Westlake, Private International Law, 4th ed., s. 209, p. 272; Dicey, Conflict of Laws, 2nd ed., 502, 503, 540—544, 810.

(*g*) See *Richards* v. *Goold* (1827), 1 Mol. 22, 24; Westlake, Private International Law, 4th ed., 205; Dicey, Conflict of Laws, 2nd ed., 502, 503, 542, 810. Until this question is settled, the deed should in such case of course be executed in accordance with the formalities required both by English law and by the law of the place where the deed is executed.

(*h*) See Encyclopædia of Forms and Precedents, Vol. XIV., pp. 218—225.

(*i*) See *Re Queensland Mercantile and Agency Co.*, [1892] 1 Ch. 219, 226, C. A.

(*k*) Sculpture Copyright Act, 1814 (54 Geo. 3, c. 56), s. 4. See title COPYRIGHT, Vol. VIII., p. 207.

(*l*) See p. 372, *ante*.

(*m*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 24.

(*n*) See p. 372, *ante*.

(*o*) See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 31, 37, and First Schedule, Part I., Forms B and C; and compare *Parsons* v. *Brand* (1890), 25 Q. B. D. 110, C. A. See also title SHIPPING AND NAVIGATION.

books of the Bank of England or the Bank of Ireland must be attested by two or more credible witnesses (*p*).

Appointment of new trustee.

**712.** Deeds evidencing the choice and appointment of a new trustee or new trustees and made under the Trustee Appointment Act, 1850 (*q*), are required to be executed under the hand and seal of the chairman for the time being of the meeting at which such choice and appointment is made and in the presence of such meeting and to be attested by two or more credible witnesses (*q*).

Bond of officer of friendly society.

**713.** The execution of the bond required under the Friendly Societies Act, 1896 (*r*), to be given by an officer of a registered society or branch and a surety or sureties must be attested by two witnesses (*s*).

Deeds under Glebe Exchange Act, 1815.

**714.** Deeds of exchange or conveyance made under the powers given by the Glebe Exchange Act, 1815 (*t*), by a parson, vicar, or other incumbent with the consent of the patron and bishop must be executed by the patron and bishop in the presence of two or more credible persons, who must by indorsement thereon attest such execution; and in such attestation it must be expressed that the deed was so executed by the patron or bishop before the execution thereof by the parson, vicar, or other incumbent (*a*).

Appointment by father of guardian.

**715.** The deed of a father appointing a guardian of his child or children should be executed in the presence of two or more credible witnesses (*b*), of which the guardian may be one (*c*).

Relinquishment of holy orders.

**716.** A deed of relinquishment of holy orders made in pursuance of the Clerical Disabilities Act, 1870 (*d*), must be executed in the presence of a witness (*e*).

Instruments of transfer etc. under Land Transfer Acts.

**717.** Every deed which is an instrument of transfer, charge, exchange, or partition of registered land, or of any registered charge on land (including any alteration of a charge), under the Land Transfer Acts, 1875 and 1897 (*f*), is required to be attested, and must be executed in the presence of a witness, who must sign his name and add his address and description (*g*).

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(*p*) National Debt Act, 1870 (33 & 34 Vict. c. 71), ss. 22, 73; see p. 372, *ante*.

(*q*) 13 & 14 Vict. c. 28, s. 3, extended by the Trustee Appointment Act, 1869 (32 & 33 Vict. c. 26), and Trustees Appointment Act, 1890 (53 & 54 Vict. c. 19).

(*r*) 59 & 60 Vict. c. 25, s. 54.

(*s*) S. 98 (4), and Second Schedule, Part III.

(*t*) 55 Geo. 3, c. 147.

(*a*) S. 10.

(*b*) It is a question whether stat. (1660) 12 Car. 2, c. 24, s. 8, enabling fathers to appoint guardians of their children by deed or will, requires any witnesses to an appointment by deed (*Morgan* v. *Hatchell* (1854), 19 Beav. 86, 87).

(*c*) *Morgan* v. *Hatchell*, *supra*.

(*d*) 33 & 34 Vict. c. 91.

(*e*) S. 3 (1), and Second Schedule.

(*f*) 38 & 39 Vict. c. 87 and 60 & 61 Vict. c. 65; see p. 371, *ante*.

(*g*) Land Transfer Rules, 1903, Nos. 107—109. See title REAL PROPERTY AND CHATTELS REAL.

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Leases under Leasing Powers etc. (Ireland) Act, 1855.

**718.** Indentures of lease made under the Leasing Powers Act for Religious Worship in Ireland, 1855 (*h*), are required to be sealed and delivered by or on behalf of the lessor in the presence of one or more than one witness (*i*).

SUB-SECT. 5.—*Effect of Non-Execution by some Parties.*

Non-execution by a party.

**719.** When an indenture is expressed to be made between several parties or a deed poll to be made by more persons than one (*j*), and some or one only of such parties or persons execute the same, it is not the deed of any person who has not executed it (*k*). But unless it were delivered as an escrow to take effect only in case of and upon its execution by all or some other of the parties thereto (*l*) it is the deed of every person who has executed it, and, owing to his being estopped from averring anything in contradiction thereof (*m*), it takes effect, as against him, according to its purport from the time of his execution thereof, notwithstanding that the other party or parties have neither executed it nor expressed his or their assent to its provisions (*n*).

Effect of disclaimer.

**720.** If, however, the other party or parties be under no obligation, independently of the deed, to execute it or abide by its provisions, the deed is liable to be avoided by his or their disclaimer of the benefit thereof (*o*). Thus an indenture of grant or other assurance of property takes effect immediately upon its execution by the grantor or assuror, and then at once passes the property expressed to be assured to the grantee or alienee, although the latter has not executed or assented to the deed; subject, however, to the property revesting in the alienor in case the benefit of the

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(*h*) 18 & 19 Vict. c. 39.

(*i*) S. 10.

(*j*) See p. 379, *ante*.

(*k*) Littleton's Tenures, s. 373; Bro. Abr. Dette (38, 80), Obligation (13, 14, 27).

(*l*) See pp. 387—390, *ante; Underhill* v. *Horwood* (1804), 10 Ves. 209, 226; *Latch* v. *Wedlake* (1840), 11 Ad. & El. 959, 965, 966; *Bonser* v. *Cox* (1841), 4 Beav. 379, 383; *Evans* v. *Bremridge* (1856), 8 De G. M. & G. 100, C. A.; *Beckett* v. *Addyman* (1882), 9 Q. B. D. 783, 788, 789, C. A., *per* FIELD, J.; *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75.

(*m*) See p. 357, *ante*.

(*n*) *Foster* v. *Mapes* (1591), Cro. Eliz. 212; Co. Litt. 229 a; *Exton* v. *Scott* (1833), 6 Sim. 31; *Cooch* v. *Goodman* (1842), 2 Q. B. 580, 600; *Fletcher* v. *Fletcher* (1844), 4 Hare, 67; *Morgan* v. *Pike* (1854), 14 C. B. 473, 484; *Re Way's Trusts* (1864), 2 De G. J. & Sm. 365, C. A.; *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296; *Whitmore-Searle* v. *Whitmore-Searle*, [1907] 2 Ch. 332; and authorities cited in next note.

(*o*) Y. B. 7 Edw. 4, 20 (pl. 21), 29 (pl. 14); Littleton's Tenures, ss. 684, 685; *Butler and Baker's Case* (1591), 3 Co. Rep. 25 a, 26 b, 27 a; *Whelpdale's Case* (1604), 5 Co. Rep. 118 a, 119 b; Shep. Touch. 70, 284, 285; *Thompson* v. *Leach* (1690), 2 Vent. 198, 202, 208; *Wankford* v. *Wankford* (1706), 1 Salk. 299, *per* HOLT, C.J., at p. 307; *Doe* d. *Lewis* v. *Bingham* (1821), 4 B. & Ald. 672; *Siggers* v. *Evans* (1855), 5 E. & B. 367, 380 *et seq.*; *Peacock* v. *Eastland* (1870), L. R. 10 Eq. 17; *Re Deveze, Ex parte Cote* (1873), 9 Ch. App. 27, 32; *Standing* v. *Bowring* (1885), 31 Ch. D. 282, 286, 288, 290, C. A.; *Re Birchall, Birchall* v. *Ashton* (1889), 40 Ch. D. 436, 439, C. A.; *Mallott* v. *Wilson*, [1903] 2 Ch. 494, 500—502. See further, as to disclaimer, p. 408, *post*.

assurance be disclaimed (*p*). So also an obligation or duty undertaken by deed is immediately binding on the person on whom it is incumbent from the moment of his execution of the deed, and before the person who is to take the benefit of the liability so assumed has expressed his assent to the transaction (*q*), though the latter may subsequently disclaim the benefit of the obligation as above mentioned (*r*).

Accepting benefit without execution.

**721.** But where a person named in some deed, whether as a party thereto or not, has, without executing the deed, accepted some benefit thereby assured to him, he is obliged to give effect to all the conditions on which the benefit was therein expressed to be conferred; and he must therefore perform or observe all covenants or stipulations on his part which are contained in the deed and on the performance or observance of which the benefit conferred was meant to be conditional (*s*). For example, a mortgagee who has made a loan on mortgage, but has not executed the mortgage deed (which has been executed by the mortgagor only), is bound to give effect to a proviso therein contained for reduction of the rate of interest on punctual payment, or for allowing the loan to remain on the mortgage for a certain term (*t*). A grantee of land, subject to the (so-called) reservation of some easement thereover, must, if he accept the grant, give effect to the reservation, though he do not execute the deed of grant (*a*). And a man who enters into land under an assurance made to him by deed (which he has not executed) for a term of years, for his life or in tail, is estopped from asserting, against the remainderman under the deed, a title thereto in fee simple as derived from his own wrongful entry and the effect of the Statutes of Limitation (*b*), even though the person who made the assurance had no rightful title to the land (*c*).

Conditional execution.

**722.** Where a deed is executed by some party or parties thereto conditionally on the understanding that the other party or parties thereto or some or one of such parties shall execute the same, it is in fact delivered as an escrow and will not take effect completely as a deed until the condition has been performed (*d*).

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(*p*) See authorities cited in previous note.

(*q*) *Butler and Baker's Case* (1591), 3 Co. Rep. 25 a, 26 b, 27 a; *Hall* v. *Palmer* (1844), 3 Hare, 532; *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296.

(*r*) *Wetherell* v. *Langston* (1847), 1 Exch. 634; and see note (*o*), p. 400, *ante*.

(*s*) Y. B. 38 Edw. 3, 8 a; Y. B. 45 Edw. 3, 11 pl. 7; Y. B. 8 Edw. 4, 8 b; Littleton's Tenures, s. 374; Bro. Abr. Dette (38, 80), Obligation (13, 14, 27); Dyer, 13 b, pl. 65; Co. Litt. 230 b and n. (1); *Brett* v. *Cumberland* (1619), 2 Roll. Rep. 63; *R.* v. *Houghton-le-Spring* (1819), 2 B. & Ald. 375; *Webb* v. *Spicer* (1849), 13 Q. B. 886, 893; *Linwood* v. *Squire* (1850), 5 Exch. 234, 236; *Macdonald* v. *Law Union Insurance Co.* (1874), L. R. 9 Q. B. 328, 330, 332.

(*t*) See previous note and next note; *Morgan* v. *Pike* (1854), 14 C. B. 473, 483—486.

(*a*) *May* v. *Belleville*, [1905] 2 Ch. 605.

(*b*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27); Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57).

(*c*) *Dalton* v. *FitzGerald*, [1897] 1 Ch. 440; [1897] 2 Ch. 86, C. A.; and see Littleton's Tenures, s. 374.

(*d*) See pp. 387—390, *ante*.

SECT. 4. Execution of a Deed.

Power of party to sue without having executed.

**723.** Any person named or sufficiently indicated in a deed poll may sue to enforce any obligation thereby undertaken in his favour, notwithstanding that he has not executed the deed (*e*); but he must observe all stipulations made therein of which the performance was a condition precedent to the liability of the maker of the deed (*f*). And any person named as a party to an indenture (*g*) may sue upon any covenant made with him and therein contained without having executed the deed (*h*), unless the transaction carried out thereby were such that his own execution of the deed was a condition precedent to his enforcement of the covenant (*i*). Thus, if by an indenture of lease a house be expressed to be demised for a term exceeding three years (*k*), and the lessee covenant with the lessor to repair the house during the term, and the lessee execute the counterpart but the lessor do not execute the lease, the lessor cannot sue the lessee upon the covenant to repair without first executing the lease, notwithstanding that the lessee have entered into possession of the house; for it is a condition precedent to the lessee's liability to repair that he shall have a valid demise of the house for the term agreed upon (*l*).

SUB-SECT 6.—*Partial Execution.*

Partial execution.

**724.** It is impossible in law to execute a deed as to part only of its provisions; and the attempted execution of a deed with some proviso purporting to qualify the liability thereunder of the executing party or to express his dissent to be bound by some provision therein contained is not a perfect execution of the deed, and as against any person entitled to have the deed executed by the party attempting such partial execution it is no execution of the deed (*m*). But it appears that, as against the party so executing a deed, such execution may be effectual, and the qualifying proviso may be rejected as repugnant and void (*n*). If the party attempting such partial execution accept some benefit under or otherwise confirm the deed, he will be bound by its provisions as if he had completely executed it (*o*).

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(*e*) See p. 379, *ante*.

(*f*) *Macdonald* v. *Law Union Insurance Co.* (1874), L. R. 9 Q. B. 328; and see p. 401, note (*s*), *ante*.

(*g*) See p. 380, *ante*.

(*h*) *Clement* v. *Henley* (1643), 2 Roll. Abr. Faits (F, 2); *Rose* v. *Poulton* (1831), 2 B. & Ad. 822, 830; *Wetherell* v. *Langston* (1847), 1 Exch. 634, 643; *Pitman* v. *Woodbury* (1848), 3 Exch. 4; *British Empire Mutual Life-Assurance Co.* v. *Browne* (1852), 12 C. B. 723; *Morgan* v. *Pike* (1854), 14 C. B. 473, 484, 486.

(*i*) See 1 Wms. Saund. 320, n. (4); 2 Wms. Saund. 352, n. (3); *Linwood* v. *Squire* (1850), 5 Exch. 234, 236; *Wilkinson* v. *Anglo-Californian Gold Mining Co.* (1852), 18 Q. B. 728; and next note.

(*k*) See p. 368, note (*b*), *ante*.

(*l*) *Soprani* v. *Skurro* (1602), Yelv. 18; *Pitman* v. *Woodbury, supra*; *Wheatley* v. *Boyd* (1851), 7 Exch. 20, 21; *Swatman* v. *Ambler* (1852), 8 Exch. 72; *Toler* v. *Slater* (1867), L. R. 3 Q. B. 42, 45.

(*m*) *Wilkinson* v. *Anglo-Californian Gold Mining Co. supra*; *Exchange Bank of Yarmouth* v. *Blethen* (1885), 10 App. Cas. 293, 298, P. C.; *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75.

(*n*) *Exchange Bank of Yarmouth* v. *Blethen, supra*, at p. 299, P. C.; and see p. 401, note (*s*), *ante*.

(*o*) *Ibid.*; and see p. 401, note (*s*), *ante*.

SUB-SECT. 7.—*Concealment of Fact of Execution.*



Concealment.

**725.** If a deed be actually sealed and delivered as such (*p*), it will take effect according to its purport, notwithstanding that the fact of its execution be concealed from or unknown to the persons or some person intended to benefit thereunder (*q*); unless it be avoided, on coming to their or his knowledge, by disclaimer of the benefit thereof (*r*).

SUB-SECT. 8.—*Re-execution*

Re-execution.

**726.** When a deed has once been effectually executed, either as a deed or as an escrow, and remains unaltered or uncancelled, it cannot well be executed again, and any attempted re-execution of the deed will have no effect. But if one attempt or affect to deliver a deed, either absolutely or as an escrow, in such a way that the attempt is altogether null and void, the deed may again be delivered in circumstances sufficient (if no previous delivery had been attempted) to make it the effective instrument of the delivering party; and in such case the later delivery, coupled with the acknowledgment of the sealing implied in such delivery (*s*), is the only true and valid execution of the deed (*t*).

Void execution.

Re-execution of voidable deed.

**727.** If a deed, when delivered, were voidable and not altogether void, as for duress or by reason of the infancy of the party making it, its redelivery alone (without resealing) after the constraint had ceased or he had attained full age would be inoperative (*a*). But if he should then re-execute, that is, reseal as well as redeliver the deed, it would be binding (*b*); and redelivery after attaining full capacity might be so made as to import an acknowledgement of the seal already attached as his seal, which would be equivalent to resealing (*c*).

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(*p*) See pp. 357, 382—387, *ante*.

(*q*) *Thompson* v. *Leach* (1690), 2 Vent. 198; *Barlow* v. *Heneage* (1702), Prec. Ch. 210; 2 Eq. Cas. Abr. 283 (B), pl. 2: *Clavering* v. *Clavering* (1704), 2 Vern. 473; 1 Eq. Cas. Abr. 24, pl. 6; (1705) 7 Bro. Parl. Cas. 410, H. L.; *Cecil* v. *Butcher* (1821), 2 Jac. & W. 565; *Doe* d. *Garnons* v. *Knight* (1826), 5 B. & C. 671; *Exton* v. *Scott* (1833), 6 Sim. 31; *Grugeon* v. *Gerrard* (1840), 4 Y. & C. (EX.) 119; *Hall* v. *Palmer* (1844), 3 Hare, 532; *Fletcher* v. *Fletcher* (1844), 4 Hare, 67; *Siggers* v. *Evans* (1855), 5 E. & B. 367; *Re Way's Trusts* (1864), 2 De G. J. & Sm. 365, C. A.; *Jones* v. *Jones*, [1874] W. N. 190; *Standing* v. *Bowring* (1885), 31 Ch. D. 282, C. A.; *Sharp* v. *Jackson*, [1899] A. C. 419; *Re McCallum*, *McCallum* v. *McCallum*, [1901] 1 Ch. 143, C. A.; *Mallott* v. *Wilson*, [1903] 2 Ch. 494.

(*r*) See p. 400, note (*o*), *ante*.

(*s*) See p. 383, *ante*.

(*t*) Y. B. 8 Hen. 6, 6, 7, pl. 15; Perkins, Laws of England, s. 154; *Jennings* v. *Bragg* (1595), Cro. Eliz. 447; 3 Co. Rep. 35 b, 36 a (see p. 390, note (*m*), *ante*); Vin. Abr. Faits (N); *Goodright* d. *Carter* v. *Straphan* (1774), 1 Cowp. 201, 203, 204; *Cole* v. *Parkin* (1810), 12 East, 471; *Tupper* v. *Foulkes* (1861), 9 C. B. (N. S.) 797; and see *Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555, 561—563, C. A.

(*a*) See previous note, and pp. 360, 390, note (*m*), *ante*.

(*b*) In contemplation of law resealing imports taking the old seal off and putting a new one on (see Bro. Abr. Faites, 78, 98; Vin. Abr. Faits (N), pl. 11). But this need not actually be done; a new acknowledgment by the party of the existing seal as his would be sufficient (see next note).

(*c*) See p. 383, *ante*, and note (*b*), *supra*. It would be a question of fact, to be

SECT. 4. Execution of a Deed.

Re-execution of deed left blank;

**728.** A writing which has been sealed and delivered with a blank so left in a material part of it that it is altogether void for uncertainty may be re-executed after the blank has been filled up, and will then for the first time become the deed of the party so executing it (*d*).

of deed made void by cancellation or erasure.

**729.** If a deed originally well executed be afterwards made void by reason of some alteration or erasure being made in a material part of it or of its having been cancelled (*e*), it may well be re-executed (*f*).

New stamp, where required on re-execution of deeds.

**730.** Where a deed which was valid when originally executed has afterwards been cancelled or altered in a material part (*g*) and is subsequently re-executed, it must, if re-executed in any part of the United Kingdom or relating (wheresoever re-executed) to any property situate or to any matter or thing done or to be done in any part of the United Kingdom, be restamped with the stamp appropriate, according to the law in force at the time of its re-execution, to its nature when so re-executed (*h*). And where a deed which was merely voidable and not altogether void when executed is afterwards re-executed so as to make it unimpeachable, it will in similar circumstances require a new stamp (*i*). But if a writing stamped with the appropriate stamp in contemplation of its execution as a deed be so sealed and delivered that such execution is entirely null and void, it will not require a fresh stamp if subsequently re-executed in an effective manner; for the latter sealing and delivery will be the only effectual execution of the deed (*k*).

## SECT. 5.—*Avoidance of Deeds.*

### SUB-SECT. 1.—*Plea of Non est factum.*

Plea of *non est factum.*

When available.

**731.** The plea of *non est factum*, or *nient son fait*, is that by which a man sought to be charged in some action or proceeding upon a writing alleged to have been sealed and delivered by him avers that it is not his deed (*l*). This plea is only available where the party sued can show either that there never has been, or that there is not existing at the time of the plea, any valid execution of the deed on his part (*m*). Thus it will support this plea to prove

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determined from the circumstances of the case, whether resealing should be implied from the redelivery; see pp. 382, 383, note (*b*), 386, note (*e*), *ante*.

(*d*) See p. 384, note (*i*), *ante*, and note (*f*), *infra*.

(*e*) See pp. 409, 411, *post*.

(*f*) *Hudson* v. *Revett* (1829), 5 Bing. 368, 371; *Hibblewhite* v. *M'Morine* (1840), 6 M. & W. 200, 215; *Tupper* v. *Foulkes* (1861), 9 C. B. (N. S.) 797, 807, 808, *per* WILLIAMS, J.

(*g*) See pp. 409, 411, *post*.

(*h*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14 (4); *Bowman* v. *Nichol* (1794), 5 Term Rep. 537; *Cordwell* v. *Martin* (1807), 1 Camp. 79; *Hill* v. *Patten* (1807), 8 East, 373; *French* v. *Patton* (1808), 9 East, 351; *Bathe* v. *Taylor* (1812), 15 East, 412; *London and Brighton Rail. Co.* v. *Fairclough* (1841), 2 Man. & G. 674, 705.

(*i*) This appears to follow upon the principle of the cases cited in the previous note.

(*k*) *Cole* v. *Parkin* (1810), 12 East, 471.

(*l*) Shep. Touch. 74.

(*m*) See *Nichols* v. *Haywood* (1545), 1 Dyer, 59 a; *Whelpdale's Case* (1604), 5

Forgery.

Mistake.

that the deed is a forgery, the seal and signature of the party charged having been counterfeited (*n*). And if a man has been induced by the machinations of some other person (whether a party or a stranger to the deed) to execute a deed under a substantial mistake as to its contents, believing it to give effect to an entirely different transaction from what is expressed therein (*o*), so that when he executed it his mind did not accompany his outward act, he may plead that for this reason the deed is not his deed, and if this plea is established by the evidence the deed will be altogether

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Co. Rep. 119 a, 119 b, and n. C in Fraser's edition of 1826 (77 English Reports, 241); *Pigot's Case* (1614), 11 Co. Rep. 26 b; Co. Litt. 35 b and n. (7); Com. Dig. Pleader, 2, W, 18; Shep. Touch. 74; *Edwards* v. *Brown* (1831), 1 Cr. & J. 307; 1 Chitty on Pleading, 7th ed. (1844), 510—512.

(*n*) See pp. 358, note (*d*), 393, note (*p*), *ante*. One is of course not estopped from proving that a deed put in evidence against him is not his deed but is forged. A forged deed is a nullity, and does not take effect at all in the manner expressed therein (see *Bank of Ireland* v. *Evans' Charities* (*Trustees*) (1855), 5 H. L. Cas. 389; *Boursot* v. *Savage* (1866), L. R. 2 Eq. 134; *Re Cooper*, *Cooper* v. *Vesey* (1882), 20 Ch. D. 611, C. A.; *Merchants of the Staple of England* (*Mayor etc.*) v. *Bank of England* (*Governor & Co.*) (1887), 21 Q. B. D. 160, C. A.; *Barton* v. *North Staffordshire Rail. Co.* (1888), 38 Ch. D. 458; *Brocklesby* v. *Temperance Building Society*, [1893] 3 Ch. 130, 135, 137, C. A.; [1895] A. C. 173, 184; *Ruben* v. *Great Fingall Consolidated*, [1904] 2 K. B. 712, C. A.; [1906] A. C. 439; *A.-G.* v. *Odell*, [1906] 2 Ch. 47, C. A.). But if a man, in whose name a deed is forged, admit or represent the same to be his deed, he will be liable, under the doctrine of estoppel by conduct, to give effect thereto in favour of any person who has altered his position on the faith of such admission or representation (*Leach* v. *Buchanan* (1802), 4 Esp. 226; *Ashpitel* v. *Bryan* (1863), 3 B. & S. 474, 492, 493; *M'Kenzie* v. *British Linen Co.* (1881), 6 App. Cas. 82, 99—101, 109; *Bank of England* v. *Cutler*, [1907] 1 K. B. 889, 908).

(*o*) It appears that the difference may be (1) in the kind of transaction given effect to, as where a conveyance on sale is executed in the belief that it is a contract of guarantee; or (2) in the property dealt with, as where a conveyance of Blackacre is made under the impression that the assurance is of Whiteacre; or (3) in the person in whose favour the deed is made, as where property is conveyed to John in the belief that it is being assured to William; or (4), according to the early authorities and upon principle, in any other particular which goes to the substance of the whole consideration or to the root of the matter: but the latest authority is opposed to this last conclusion, and, indeed, if read literally, would appear to exclude all degrees of difference other than as (1) above. See as to (1) *Thoroughgood's Case* (1584), 2 Co. Rep. 9 a; *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704; *Bagot* v. *Chapman*, [1907] 2 Ch. 222. As to (2) *Altham's case* (1610), 8 Co. Rep. 150 b, 155; *Miller* v. *Travers* (1832), 8 Bing. 244, 248; *Doe* d. *Gord* v. *Needs* (1836), 2 M. & W. 129, 139, 140; *Raffles* v. *Wichelhaus* (1864), 2 H. & C. 906; *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266; (where KEKEWICH, J., held the defendant to be estopped from averring his error; reversed on a point upon the Statute of Frauds [1903] 1 Ch. 434, C. A.). As to (3) *Boulton* v. *Jones* (1857), 2 H. & N. 564; *Hardman* v. *Booth* (1863), 1 H. & C. 803; *Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757, 762, 763, 794, 795; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459; *Re Cooper*, *Cooper* v. *Vesey* (1882), 20 Ch. D. 611, C. A. And as to (4) Y. B. 30 Edw. 3, 31 b; Y. B. 47 Edw. 3, 3 b, pl. 5; Y. B. 9 Hen. 6, 59, pl. 8; 2 Roll. Abr. Faits (S.), pl. 6, 7, 8; Com. Dig. Fait B (2); *Simons* v. *Great Western Rail. Co.* (1857), 2 C. B. (N. S.) 620, *per* WILLES, J., at p. 624; *Kennedy* v. *Panama etc. Mail Co.* (1867), L. R. 2 Q. B. 580, 587, 588; *Smith* v. *Hughes* (1871), L. R. 6 Q. B. 597; *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108; and compare *per* WARRINGTON, J., *Howatson* v. *Webb*, [1907] 1 Ch. 537, 544, 545, seemingly approved, [1908] 1 Ch. 1, C. A. (where note that the defendant was a solicitor's managing clerk and could not have been misled if he had read the deed, but chose to execute it without reading it).

SECT. 5. **Avoidance of Deeds.**

void from the beginning (*p*). A deed so procured is no more the deed of the person who was thus induced to execute it than a forged deed is (*q*).

Where avoidance by mistake may be pleaded.

**732.** But a person may be precluded by his own negligence, carelessness, or inadvertence from averring his mistake. For if a blind or an illiterate man execute a deed without requiring it to be read to him he will be estopped from asserting that it is not his deed, even though the contents be different from what he believed them to be (*r*). And if one capable of understanding the contents of a deed execute a deed without reading it he will equally be bound, notwithstanding that he were induced to execute it by a false representation fraudulently made as to its contents (*s*). It appears indeed that, in cases of alleged mistake, the plea of *non est factum* can only be supported in cases where a person whose faculties are impaired or whose business capacity is below the average, such as an illiterate or a blind man or a man of great age or a woman unversed in business, has, without negligence or carelessness on his or her part, been induced to execute a deed by the fraudulent representation of some party or stranger to the deed that the transaction evidenced thereby is entirely different from what is expressed therein, and in cases of a similar nature.

Where one is estopped from averring his own mistake.

*A fortiori*, if a man entirely through his own inadvertence and without being misled by another execute a deed carrying out a different transaction from what he believed to be expressed therein, he will be bound thereby (*t*). Similarly, if a man seal and deliver at his solicitor's instance some writing which he knows to be a document in some way affecting his property or his legal position or relations, and have such confidence in his solicitor that he is willing to execute it without having it explained to him, he is precluded from averring that it is not his deed (*u*). And where a layman well understands the general nature of the transaction expressed to be effected by some writing which he has sealed and delivered, he cannot avoid its provisions on the ground that he did

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(*p*) (1505) Keil. 70 b, pl. 6; *Thoroughgood's Case* (1584), 2 Co. Rep. 9 a; *Maunxel's Case* (1584), Moore (K. B.), 182, 184; *Pigot's Case* (1614), 11 Co. Rep. 26 b, 27 b, 28 a; *Shulter's Case* (1611), 12 Co. Rep. 90; Shep. Touch. 56; *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704; *National Provincial Bank of England* v. *Jackson* (1886), 33 Ch. D. 1, C. A., *per* COTTON, L.J., at p. 10; *Lewis* v. *Clay* (1897), 67 L. J. (Q. B.) 224; *Bagot* v. *Chapman*, [1907] 2 Ch. 222, 227; and see *Howatson* v. *Webb*, [1907] 1 Ch. 537; [1908] 1 Ch. 1, C. A.; *Chaplin & Co., Ltd.* v. *Brammall*, [1908] 1 K. B. 233, 234, 235, C. A.

(*q*) See *Foster* v. *Mackinnon*, *supra*.

(*r*) *Thoroughgood's Case*, *supra*; *Maunxel's Case*, *supra*, and see p. 386, *ante*.

(*s*) See *Anon.* (1683), Skin. 159, pl. 6; *Albemarle* (*Duchess*) v. *Bath* (*Earl*) (1693), Freem. (CH.) (1693) 193, 194; S. C., *sub nom. Bath* (*Earl*) v. *Mountague* (*Earl*) (1693), 3 Cas. in Ch. 55, 56, 59, 75, 76; Shep. Touch. 56; *Hunter* v. *Walters* (1871), 7 Ch. App. 75, *per* MELLISH, L.J., at p. 87; *Howatson* v. *Webb*, *supra*, *per* FARWELL, L.J.; *Chaplin & Co., Ltd.* v. *Brammall*, *supra*; *Alliance Credit Bank of London* v. *Owen* (1908), *Times*, 27th May, 1908.

(*t*) See *Tamplin* v. *James* (1880), 15 Ch. D. 215, C. A.; *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266; reversed on other grounds, [1903] 1 Ch. 434, C. A.

(*u*) *Hunter* v. *Walters*, *supra*, *per* MELLISH, L.J., at p. 88; *King* v. *Smith*, [1900] 2 Ch. 425, 430.

not exactly comprehend the legal effect of the words used or intend to do the acts or incur the obligations which, according to the legal construction of the words used, are therein expressed to be done or undertaken (*x*).

Deed executed under a common mistake of fact.

**733.** Where a deed gives effect to or embodies an agreement entered into under a mistake common to both parties as to some material fact (for example, a contract made in the belief that some person is living, who is in fact dead, or that some property is in existence, which is not), the agreement is altogether void and not merely voidable (*a*). It follows that the deed is void and not voidable; and it appears upon principle that, if either party should be sued in an action founded on some obligation undertaken by the deed, he might plead *non est factum* (*b*).

Other cases in which *non est factum* may be pleaded.

**734.** The plea of *non est factum* is likewise made good where the writing on which the party is charged was delivered by him as a mere escrow to take effect in some contingency which has not happened (*c*). And this plea may also be supported by evidence that the execution of the writing, on which it is sought to charge the party, is at the time of the plea null and void, though it may originally have been valid; as where the writing has been altered in a material part since its execution (*d*), or has been cancelled by

(*x*) See *Powell* v. *Smith* (1872), L. R. 14 Eq. 85; *Tamplin* v. *James* (1880), 15 Ch. D. 215, C. A.; *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108.

(*a*) *Hitchcock* v. *Giddings* (1817), 4 Price, 135, 141; *Strickland* v. *Turner* (1852), 7 Exch. 208; *Couturier* v. *Hastie* (1856), 5 H. L. Cas. 673; *Cochrane* v. *Willis* (1865), 1 Ch. App. 58; *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.*, [1895] 2 Ch. 273, 276, 281, 282, 284, C. A.; *Scott* v. *Coulson*, [1903] 1 Ch. 453, 2 Ch. 249, 252, C. A. For this purpose a common mistake of the parties as to some matter of private right (for instance, as to their respective interests in some land or goods) is a mistake of fact and not of law (*Bingham* v. *Bingham* (1748), 1 Ves. Sen. 126; *Broughton* v. *Hutt* (1858), 3 De G. & J. 501, C. A.; *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149; *Jones* v. *Clifford* (1876), 3 Ch. D. 779; *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.*, *supra*; *Allcard* v. *Walker*, [1896] 2 Ch. 369).

(*b*) See p. 404, note (*m*), *ante*. An agreement entered into under a common mistake of fact appears to be void for the same reason that a contract or conveyance, which one is induced to make under a mistake as to the substance of the transaction, is void (where the party is not estopped from averring his mistake); that is, because there was no true consent of the parties, their minds not accompanying their outward acts (see pp. 405, note (*o*), 406, note (*p*), *ante*). And it is now considered that an agreement made under a common mistake of fact is void at law, and there is no necessity for any party to have recourse to equity or to take any proceedings in order to have the agreement set aside or its nullity established (see *per* LINDLEY, L.J., *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.*, *supra*; *per* VAUGHAN WILLIAMS, L.J., *Scott* v. *Coulson*, *supra*). It is thought that a deed of conveyance executed under a common mistake of fact is equally void. Thus, if A. and B., believing Blackacre to be A.'s and Whiteacre (which in truth is A.'s also) to be B.'s, by deed exchange Blackacre for Whiteacre, A. can recover Blackacre from B. (see cases cited in previous note).

(*c*) Com. Dig. Pleader (2, W, 18); see pp. 387—390, *ante*.

(*d*) *Whelpdale's Case* (1604), 5 Co. Rep. 119 a; *Pigot's Case* (1614), 11 Co. Rep. 26 b; Com. Dig. Pleader (2, W, 18); Shep. Touch. 74; *Cock* v. *Coxwell* (1835), 2 Cr. M. & R. 291, 292, *per* GURNEY, B.; *Calvert* v. *Baker* (1838), 4 M. & W. 417, *per* PARKE, B., at p. 418; 1 Chitty on Pleading, 7th ed. (1844), p. 511; *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75, 79. See p. 411, *post*.

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tearing off the seal or otherwise (*e*), or has been avoided by the disclaimer of the person for whose benefit it was executed (*f*).

But a man cannot plead *non est factum* (*g*) where the deed was merely voidable at his option when he executed it, or was void in consequence of the provisions therein contained (*h*). He cannot, therefore, successfully plead that a deed is not his which he was induced to execute by fraud, misrepresentation, duress, or undue influence (*i*), or which was voidable on account of his infancy (*k*), or which was void or unenforceable for illegality (*l*).

The above rules still govern all cases where it is sought to charge a man upon some sealed writing which he denies to be his deed; although under the present practice the old formal pleading is abolished (*m*).

SUB-SECT. 2.—*Disclaimer.*

Disclaimer.

**735.** No man is obliged to accept any assurance made to him or obligation undertaken in his favour without his consent (*n*). If, therefore, any such assurance or obligation be so made or undertaken by some deed, he may disclaim the benefit of the deed; and such disclaimer need not be made by matter of record or deed, but may be in words unwritten or by conduct (*o*). Upon such disclaimer the deed and the act evidenced thereby will become void; and if the deed contained an assurance to the person disclaiming of some estate or interest in property the same will revest in the party who made the assurance or his representatives (*p*).

Where there is an obligation to accept the benefit assured.

But when a man has once unequivocally expressed his assent to some assurance made to him of some estate, interest, or right he cannot afterwards disclaim it (*q*). And a man cannot lawfully disclaim any estate, interest, or right assured to him without his concurrence

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(*e*) Com. Dig. Pleader (2, W, 18); Shep. Touch. 69, 74; see p. 409, *post.*

(*f*) *Whelpdale's Case* (1604), 5 Rep. 119 a, b; Com. Dig. Pleader (2, W, 18); Shep. Touch. 74; see *infra.*

(*g*) See pp. 404, note (*o*), 406, notes (*r*), (*s*), (*t*), (*u*), 407, note (*x*), *ante.*

(*h*) See next note.

(*i*) *Whelpdale's Case, supra;* Com. Dig. Pleader (2, W, 18); Shep. Touch. 74; *Edwards* v. *Brown* (1831), 1 Cr. & J. 307, 312–314; see p. 360, *ante*, and note (*m*), *infra.*

(*k*) See p. 360, note (*t*), *ante*, and previous note.

(*l*) See p. 360, note (*f*), *ante*, and note (*i*), *supra.*

(*m*) See *Hunter* v. *Walters* (1871), 7 Ch. App. 75; *National Provincial Bank of England* v. *Jackson* (1886), 33 Ch. D. 1, 10, C. A; *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192, 194; *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; *King* v. *Smith*, [1900] 2 Ch. 425, 429; *Howatson* v. *Webb*, [1907] 1 Ch. 537; [1908] 1 Ch. 1, C. A.; *Bagot* v. *Chapman*, [1907] 2 Ch. 222; *Alliance Credit Bank of London* v. *Owen* (1908), *Times*, 27th May, 1908.

(*n*) See Bract. fo. 15 b, 16; Shep. Touch. 229, 267, 394; *Wellesley* (*Viscount*) v. *Withers* (1855), 1 Jur. (N. S.) 706; and next note.

(*o*) *Townson* v. *Tickell* (1819), 3 B. & Ald. 31; *Bingham* v. *Clanmorris* (1828), 2 Mol. 253; *Stacey* v. *Elph* (1833), 1 My. & K. 195, 199; *Begbie* v. *Crook* (1835), 2 Bing. (N. C.) 70; *Doe* d. *Chidgey* v. *Harris* (1847), 16 M. & W. 517, 520, 521; *Foster* v. *Dawber* (1860), 8 W. R. 646; *Re Birchall, Birchall* v. *Ashton* (1889), 40 Ch. D. 436, 439, C. A.; and see pp. 400, 401, *ante;* 5 Davidson, Precedents in Conveyancing, 3rd ed., Part II., p. 661, n.

(*p*) See p. 400, note (*o*), *ante; Stacey* v. *Elph* (1833), 1 My. & K. 195; *Wyman* v. *Carter* (1871), L. R. 12 Eq. 309.

(*q*) See *Doe* d. *Smyth* v. *Smyth* (1826), 6 B. & C. 112, 117; *Doe* d. *Chidgey* v.

if he be under some legal or equitable obligation to accept it. Thus, where one has entered into a binding contract to purchase land and has paid the price, he is bound to accept a conveyance of the legal estate in the land (*r*); his assent was given by entering into the contract, and an attempted disclaimer of the benefit of the conveyance would be ineffectual (*s*). So trustees who have accepted and are acting in the trusts of a marriage settlement containing an agreement that the wife's after-acquired property shall be conveyed to them, could not lawfully disclaim a conveyance to them of such property (*s*).

Where, however, property is conveyed to a person upon trust he may, if he has not accepted the trust, disclaim the property and the trust, and thereupon the conveyance is made void as regards him and the property revests in the settlor, but the settlor will hold the property upon the trusts declared by the deed (*t*).

Disclaimer by grantee to uses.

**736.** In the case of a conveyance by deed operating under the Statute of Uses (*u*) a disclaimer by the grantee to uses is inoperative and will not defeat the use which the statute has instantaneously converted into a legal estate in the *cestui que use* (*a*). But a grant of land "unto and to the use of" the grantee takes effect at common law and not under the statute, and a disclaimer by the grantee under such a grant avoids the deed (*b*).

SUB-SECT. 3.—*Cancellation.*

Cancellation.

**737.** The cancellation of a deed is obliterating it or taking off the seal or otherwise altering or defacing it with the intent that it shall become void; and a deed may lawfully be cancelled either by the person who has it in his possession as being solely entitled thereunder or by anyone (including the party bound by the deed) to whom such person has delivered it up to be cancelled (*c*).

Effect of cancellation.

When a deed is so cancelled it becomes void, and no action can thereafter be maintained on any covenant or promise contained in it (*d*). But such cancellation has no retrospective operation; it does

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*Harris* (1847), 16 M. & W. 517, 520, 524; *Bence* v. *Gilpin* (1868), L. R. 3 Exch. 76; *Re Lord and Fullerton's Contract*, [1896] 1 Ch. 228, C. A.

(*r*) *Re Cary Elwes' Contract*, [1906] 2 Ch. 143.

(*s*) See *Bence* v. *Gilpin* (1868), L. R. 3 Exch. 76.

(*t*) *Jones* v. *Jones*, [1874] W. N. 190; *Mallott* v. *Wilson*, [1903] 2 Ch. 494. It seems that a release may operate as a disclaimer if that is the intention (*Nicloson* v. *Wordsworth* (1818), 2 Swan. 365, 370, 372; compare *Crewe* v. *Dicken* (1798), 4 Ves. 97; *Doe* d. *Wyatt* v. *Stagg* (1839), 5 Bing. (N. C.) 564). See further, as to disclaimer by trustees, title TRUSTS AND TRUSTEES.

(*u*) 27 Hen. 8, c. 10 (1535). See title REAL PROPERTY AND CHATTELS REAL.

(*a*) *Gorton's Case* (1629), 2 Roll. Abr. 787; 4 Cru. Dig., 4th ed., 131; Sugden on Powers, 8th ed., 11; compare Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 7, under which a use takes effect by force of the seisin originally vested in the grantee to uses.

(*b*) *Doe* d. *Lloyd* v. *Passingham* (1827), 6 B. & C. 305; *Peacock* v. *Eastland* (1870), L. R. 10 Eq. 17.

(*c*) See Perkins, Profitable Book, ss. 135, 136; Vin. Abr. Faits (X, pl. 1—3); Shep. Touch. 68—70; *Harrison* v. *Owen* (1738), 1 Atk. 520; 2 Bl. Com. 308, 309; *Bamberger* v. *Commercial Credit Mutual Assurance Co.* (1855), 15 C. B. 676, 693, 694.

(*d*) *Mathewson's Case* (1597), 5 Co. Rep. 22 b, 23 a; *Pigot's Case* (1614), 11

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not make the deed void *ab initio;* and if the deed operated as a conveyance of any property its cancellation has not the effect of revesting or reconveying the estate or interest which was so assured (*e*).

How a deed should be cancelled.

In order that a deed may be indubitably cancelled the seal should be taken off, or it should be otherwise unmistakably defaced. If the person entitled under the deed should simply deliver it up undefaced to the party bound thereby, and the latter were to lose possession of it, it might afterwards be put in suit against him, and in that case he would not be able to plead that it was not his deed (*f*). But it appears that if the person entitled under the deed deliver it to be cancelled or as a gift to the party bound thereby, that is equivalent to a release of any right of action arising thereunder (*g*).

Removal of seal of one of several parties.

**738.** If more parties than one be bound by a deed, each in a several obligation or covenant and not jointly, the removal of the seal of one of them with the intention of cancellation will only avoid the deed as against that one and not as against the others (*h*). But if they were bound jointly, or jointly and severally, the removal of the seal of one of them will avoid the deed as against all (*i*).

For what purposes a cancelled deed can be put in evidence.

A cancelled deed cannot effectually be put in evidence to maintain an action to enforce any obligation thereby created (*k*), as the party to be bound can plead that it is not his deed (*l*). But it may be put in evidence to prove that before it was cancelled it operated as a conveyance of some estate or interest in property (*m*),

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Co. Rep. 26 b; Shep. Touch. 70; *Atty* v. *Parish* (1804), 1 Bos. & P. (N. R.) 104; *Davidson* v. *Cooper* (1843), 11 M. & W. 778, *per* Lord ABINGER, C.B., at p. 800; *Ward* (*Lord*) v. *Lumley* (1860), 5 H. & N. 656, *per* BRAMWELL, B., at p. 658. As to accidental cancellation, see p. 414, *post.*

(*e*) *Nelthorpe* v. *Dorrington* (1674), 2 Lev. 113; *Leech* v. *Leech* (1675), 2 Rep. Ch. 100; *Hudson's Case* (1704), 2 Eq. Cas. Abr. 52, pl. 5; *Magennis* v. *MacCullogh* (*temp.* Geo. I.), Gilb. (CH.) 235, 236; *Harrison* v. *Owen* (1738), 1 Atk. 520; *Bolton* v. *Carlisle* (*Bishop*) (1793), 2 Hy. Bl. 259, 263; *Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*) (1805), 6 East, 86; *Doe* d. *Lewis* v. *Bingham* (1821), 4 B. & Ald. 672, *per* HOLROYD, J., at p. 677; *Doe* d. *Courtail* v. *Thomas* (1829), 9 B. & C. 288; *Gummer* v. *Adams* (1843), 13 L. J. (EX.) 40; *Davidson* v. *Cooper* (1843), *supra; Ward* (*Lord*) v. *Lumley*, *supra; Re Hancock, Hancock* v. *Berrey* (1888), 57 L. J. (CH.) 793; and see 44 Sol. Jo. 481. Compare *Re Way's Trusts* (1864), 2 De G. J. & Sm. 365, C. A.

(*f*) *Waberley* v. *Cockerel* (1541), 1 Dyer, 51 a; *Cross* v. *Powel* (1595), Cro. Eliz. 483; see p. 404, *ante.*

(*g*) Shep. Touch. 70; *Harrison* v. *Owen*, *supra; Richards* v. *Syms* (1740), Barn. (CH.) 90, 94; *Byrn* v. *Godfrey* (1798), 4 Ves. 6, 10; *Duffield* v. *Elwes* (1827), 1 Bli. (N. S.) 497, 537—540, H. L.; *Cross* v. *Sprigg* (1849), 6 Hare, 552, 556. It seems that if a creditor by bond or covenant deliver up the deed to the debtor as a gift or with intention to forgive the debt, that amounts to delivering up the deed to be cancelled, as the donee will then be entitled to deface or destroy it if he will (*Barton* v. *Gainer* (1858), 3 H. & N. 387; *Rummens* v. *Hare* (1876), 1 Ex. D. 169, C. A.; and see 44 Sol. Jo. 481; and p. 376, note (*i*), *ante*).

(*h*) *Mathewson's Case* (1597), 5 Co. Rep. 22 b; *Collins* v. *Prosser* (1823), 1 B. & C. 682.

(*i*) *Mathewson's Case, supra,* at p. 23 a; *Bayly* v. *Garford* (1641), March, 125, 129; *Seaton* v. *Henson* (1678), 2 Show. 28, 29; (1678), 2 Lev. 220.

(*k*) See p. 409, note (*d*), *ante.*

(*l*) See p. 408, note (*e*), *ante.*

(*m*) See note (*e*), *supra.*

or to prove any collateral fact or any other fact than that the person who executed it thereby undertook some obligation which is now sought to be enforced thereunder (*n*).

SUB-SECT. 4.—*Alteration and Erasure.*

Alteration before execution.

**739.** A writing proposed to be executed as a deed may be altered by erasure or interlineation or in any other way before it is so executed; and any alteration so made before execution does not affect the validity of the deed (*o*). Any alteration, erasure or interlineation appearing upon the face of a deed is presumed, in the absence of evidence to the contrary, to have been made before the execution of the deed (*p*).

Material alteration by a party after execution.

**740.** If an alteration (by erasure, interlineation, or otherwise) be made in a material part of a deed, after its execution, by or with the consent of any party thereto or person entitled thereunder, but without the consent of the party or parties liable thereunder, the deed is thereby made void. The avoidance, however, is not *ab initio* or so as to nullify any conveyancing effect which the deed has already had, but only operates as from the time of such alteration and so as to prevent the person, who has made or authorised the alteration, and those claiming under him from putting the deed in suit to enforce against any party bound thereby, who did not consent to the alteration, any obligation, covenant, or promise thereby undertaken or made (*q*.)

What is a material alteration.

A material alteration is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as

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(*n*) *Hutchins* v. *Scott* (1837), 2 M. & W. 809; *Falmouth* (*Earl*) v. *Roberts* (1842), 9 M. & W. 469, 471; *Agricultural Cattle Insurance Co.* v. *Fitzgerald* (1851), 16 Q. B. 432, 440, 441; *Enthoven* v. *Hoyle* (1852), 13 C. B. 373, Ex. Ch.; *Pattinson* v. *Luckley* (1875), L. R. 10 Exch. 330, 335, 336.

(*o*) Perkins, Profitable Book, s. 155; Co. Litt. 225 b; Shep. Touch. 55; *Cole* v. *Parkin* (1810), 12 East, 471; and see *Matson* v. *Booth* (1816), 5 M. & S. 223, 226, 227; *Doe* d. *Lewis* v. *Bingham* (1821), 4 B. & Ald. 672; *Hall* v. *Chandless* (1827), 4 Bing. 123; *Jones* v. *Jones* (1833), 1 Cr. & M. 721. When a writing has been so altered it is the practice to note in the attestation clause what alteration has been made, and this practice should always be followed (see Shep. Touch. 55; Encyclopædia of Forms and Precedents, Vol. XIV., pp. 238, 239; 1 Key and Elphinstone, Precedents in Conveyancing, 9th ed., 703, 704).

(*p*) *Leyfield's* (*Doctor*) *Case* (1611), 10 Co. Rep. 88 a, 92 b; Co. Litt. 225 b and n. (1); *Trowel* v. *Castle* (1661), 1 Keb. 21; *Fitzgerald* v. *Fauconberge* (*Lord*) (1731), Fitz-G. 207, 214, *per* REYNOLDS, C.B.; *Doe* d. *Tatum* v. *Catomore* (1851), 16 Q. B. 745; *Simmons* v. *Rudall* (1851), 1 Sim. (N. S.) 115, *per* Lord CRANWORTH, V.-C., at p. 136; *Williams* v. *Ashton* (1860), 1 John. & H. 115, *per* WOOD, V.-C., at p. 118. It is otherwise in the case of a will; see title WILLS. As to alterations etc. in a contract under hand only, see p. 431, *post.*

(*q*) *Anon.* (1511), Keil. 162, pl. 2; *Gilford* v. *Mills* (1511), 164, pl. 7; *Markham* v. *Gonaston* (1598), Cro. Eliz. 626, 627; *Pigot's Case* (1614), 11 Co. Rep. 26 b; *Master* v. *Miller* (1791), 4 Term Rep. 320, 329—332, 345; (1793) 2 Hy. Bl. 140, 142, 143, Ex. Ch., 1 Smith, L. C., 11th ed., 767; *Weeks* v. *Maillardet* (1811), 14 East, 568; *Langhorn* v. *Cologan* (1812), 4 Taunt. 330; *Fairlie* v. *Christie* (1817), 7 Taunt. 416; *Forshaw* v. *Chabert* (1821), 3 Brod. & Bing. 158; *Davidson* v. *Cooper* (1844), 13 M. & W. 343, 352, Ex. Ch.; *Fazakerley* v. *M'Knight* (1856), 6 E. & B. 795; *Sellin* v. *Price* (1867), L. R. 2 Exch. 189; *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555, 559, 560, 571, C. A.; *Lowe* v. *Fox* (1887), 12

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originally expressed (*r*), or reduces to certainty some provision which was originally unascertained and as such void (*s*), or may otherwise prejudice the party bound by the deed as originally executed (*t*).

Effect of such alteration.

The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed (*a*). The avoidance of the deed is not retrospective, and does not revest or reconvey any estate or interest in property which passed by the deed (*b*). And the deed may be put in evidence to prove that such estate or interest so passed, or for any other purpose than to maintain an action to enforce some agreement therein contained (*c*).

Material alteration without consent.

**741.** Where a deed is altered or defaced by, or by the direction of, a person subject to some liability thereunder, without the consent of the person entitled thereunder, the latter may, nevertheless, enforce such liability against him (*d*).

Alteration with the consent of all parties.

**742.** If a deed be altered in a material part, after its execution, with the consent of the person or persons liable thereunder, that does not of itself alone avoid the deed or preclude the party entitled thereunder from enforcing against such person or persons any agreement contained therein (*e*).

How far new stamp necessary.

But under the Stamp Act, 1891 (*f*), if a deed, which has been executed in any part of the United Kingdom or relates, wheresoever executed, to any property situate or to any matter or thing done or to be done in any part of the United Kingdom, be altered with the consent of the parties, after its execution is entirely complete, in such a way as to make it in effect a new instrument, it cannot be given in evidence (except in criminal

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App. Cas. 206, 214, 216; *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; see also *Bank of Hindostan, China and Japan* v. *Smith* (1867), 36 L. J. (C. P.) 241; *Pattinson* v. *Luckley* (1875), L. R. 10 Exch. 330, 333, 334.

(*r*) *Gardner* v. *Walsh* (1855), 5 E. & B. 83, 89; see also p. 415, *post*, and previous note.

(*s*) *Markham* v. *Gonaston* (1598), Cro. Eliz. 626, 627; p. 384, note (*l*), *ante*; compare *Eagleton* v. *Gutteridge* (1843), 11 M. & W. 465, 468, 469; *Re Barned's Banking Co., Ex parte Contract Corporation* (1867), 3 Ch. App. 105, 115.

(*t*) See *Burchfield* v. *Moore* (1854), 3 E. & B. 683, 686; *Gardner* v. *Walsh*, *supra*; *Aldous* v. *Cornwell* (1868), L. R. 3 Q. B. 573, 578; *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555, 562—568, 572—574, C. A.

(*a*) See p. 409, *ante*.

(*b*) See p. 410, note (*e*), *ante*.

(*c*) See p. 411, note (*n*), *ante*.

(*d*) *Brown* v. *Savage* (1674), Cas. *temp.* Finch, 184. This is a case of relief in equity, but it is submitted that the modern law coincides with the rule of equity in the above respect (see p. 414, notes (*m*), (*n*), *post*).

(*e*) *Markham* v. *Gomaston* (1598), Moore (K. B.), 547; 9 East, 354, n. (blanks filled up); *Zouch* v. *Claye* (1672), 2 Lev. 35 (additional obligee added to a bond); *Paget* v. *Paget* (1687), 2 Rep. Ch. 410 (blanks filled up); *Bates* v. *Grabham* (1703), 2 Salk. 444; *French* v. *Patton* (1808), 9 East, 351, 355—357; *Matson* v. *Booth* (1816), 5 M. & S. 223, 227; *Eagleton* v. *Gutteridge*, *supra*; *Adsetts* v. *Hives* (1863), 33 Beav. 52; as to which, see pp. 413, note (*i*), 415, note (*b*), *post*.

(*f*) 54 & 55 Vict. c. 39, s. 14 (4), replacing Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 17.

proceedings), and will not be available for any purpose whatever unless it be duly stamped with the stamp appropriate, according to the law in force at the time when the alteration was made, to the transaction evidenced by the deed in its altered condition (*g*). If, however, such a deed be altered with the consent of all parties whilst its execution is in effect still *in fieri* and not entirely complete, as where the parties are met to complete the transaction agreed upon, and after one of them has executed the deed a material alteration is suggested and made in it and the deed is then executed by the others and re-executed by the party first mentioned, it does not require a new stamp (*h*). And it appears that if alterations made with the consent of the parties after the execution of a deed be such as do not make it a new instrument in effect, it will not require a new stamp, notwithstanding that the alterations were material in the sense that they reduced the parties' agreement to certainty in some particular in which it was previously uncertain (*i*).

Material alteration made by a stranger after execution.

**743.** If after the execution of a deed it be intentionally altered in some material part by a stranger (one who is neither a party nor entitled thereunder), such alteration has the same effect exactly (*k*), as against a person entitled under and having the custody of the deed, as an alteration made by that person himself, notwithstanding that the alteration were made without his consent (*l*). But where a

(*g*) See p. 404, note (*h*), *ante*.

(*h*) *Jones* v. *Jones* (1833), 1 Cr. & M. 721; *Spicer* v. *Burgess* (1834), 1 Cr. M. & R. 129. In this case the first execution would in effect be conditional on the others accepting and executing the deed as it stood, and if they refused the deed would be void and would not be the deed of the party who executed it (see pp. 400—402, *ante*); *Matson* v. *Booth* (1816), 5 M. & S. 223, where note that the party intended to benefit under the deed as originally executed expressly refused to accept the promises thereby made; see also *Doe* d. *Lewis* v. *Bingham* (1821), 4 B. & Ald. 672, 675, 676; *Hall* v. *Chandless* (1827), 4 Bing. 123, 129, 130.

(*i*) See *Adsetts* v. *Hives* (1863), 33 Beav. 52; and p. 415, notes (*b*), (*d*), *post*. It does not appear, however, whether any objection as to the stamp was taken in this case.

(*k*) See p. 411, *ante*.

(*l*) *Pigot's Case* (1614), 11 Co. Rep. 26 b, 27 a; *Davidson* v. *Cooper* (1843), 11 M. & W. 778, 779, 801, 802; (1844) 13 M. & W. 343, 352, Ex. Ch.; *Bank of Hindostan, China and Japan* v. *Smith* (1867), 36 L. J. (C. P.) 241; *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802, 813, *per* BLACKBURN, J.; *Pattinson* v. *Luckley* (1875), L. R. 10 Exch. 330, 333, 334; *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555, 559, 562, 571, C. A. But it appears that the rule so laid down is open to be reviewed in the House of Lords when the alteration is made against the will of the person having the custody (see *Lowe* v. *Fox* (1887), 12 App. Cas. 206, *per* Lord HERSCHELL, at pp. 216, 217). It may be remarked that the reason given for the rule laid down in *Davidson* v. *Cooper* (1844), 13 M. & W. 352, was that the person who has the custody of an instrument is bound to preserve it in its original state. This reaffirmed one half of the strict rule of the old law (p. 414, note (*n*), *post*). But it may be contended that the principles on which the old obligation to keep a deed safe has been relaxed are equally applicable to the obligation to preserve the deed unaltered (see cases cited p. 414, note (*n*), *post*); *Henfree* v. *Bromley* (1805), 6 East, 309, *per* Lord ELLENBOROUGH, C.J., at pp. 311, 312; 1 Preston, Abstracts of Title, 2nd ed., 157; *Hutchins* v. *Scott* (1837), 2 M. & W. 809, *per* ALDERSON, B., at p. 814; Sugden on Powers, 8th ed., 603). And it may be observed that it seems that the actual decision in *Davidson* v. *Cooper*, *supra*, concerned an alteration made intentionally, though under a mistake of law, by a clerk or servant (see *per* BLACKBURN, J., in *Robinson* v. *Mollett*, *supra*, at

SECT. 5. Avoidance of Deeds.

person entitled under a deed has not any present right to keep it in his custody (as where he is entitled on the death of some other person enjoying some interest or right thereunder for life and so in possession of the deed), it appears that a material alteration made without the former person's consent while the deed is in the latter person's possession will not prevent the former from putting the deed in evidence to enforce his rights thereunder (*m*).

Accidental alteration of a deed.

**744.** If a deed be obliterated (wholly or partially) or defaced, or the seal be detached or destroyed by accident, without the agency of some responsible human being intending so to alter it (as in the case of damage done by accidental fire, animals, a child, or a lunatic), that does not now avoid it or preclude its being given in evidence for any purpose (*n*); and if a deed be damaged in this manner so that its contents have become wholly or partially illegible,

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p. 814). It may well be that a person entitled under and in possession of a deed ought to be precluded from asserting that an alteration made therein by a clerk, servant, or agent intrusted by him with the custody of the deed was made without his authority (see *Bank of Hindostan, China, and Japan* v. *Smith* (1867), 36 L. J. (C. P.) 241); unless, perhaps, the alteration were made for the custodian's own fraudulent purposes (see *Ruben* v. *Great Fingall Consolidated*, [1904] 2 K. B. 712, C. A.; [1906] A. C. 439). The case where a stranger, wrongfully and without the knowledge and against the will of the person entitled under and in possession of a deed, obtains access to and materially alters the deed appears to be entirely different; and to hold that the person injured is precluded from asserting his innocence of the alteration appears to be equivalent to ruling that he must keep the deed safe at his peril.

(*m*) *Dalston* v. *Coatsworth* (1721), 1 P. Wms. 731. This is a case of relief in equity; but it is thought that in this respect the rule of equity will now prevail (see next note). Besides, in the above case the reason given for the rule in *Davidson* v. *Cooper* (1844), 13 M. & W. 352, does not apply (see previous note).

(*n*) *Leyfield's* (*Doctor*) *Case* (1611), 10 Co. Rep. 88 a, 92 b, 93 a; *Argoll* (*Lady*) v. *Cheney* (1625), Palm. 402, 403; S. C., Lat. 71, 82; *Anon.* (*circa* 1627), Lat. 226; *Clerke* d. *Prin* v. *Heath* (1669), 1 Mod. Rep. 11, *per* TWISDEN, J.; *Read* v. *Brookman* (1789), 3 Term Rep. 151, *per* ASHHURST, J., at p. 158; *Master* v. *Miller* (1791), 4 Term Rep. 320, *per* BULLER, J., at p. 339; *Bolton* v. *Carlisle* (*Bishop*) (1793), 2 Hy. Bl. 259, 263, 264; 1 Preston, Abstracts of Title, 2nd ed., 157, 3 *ibid.* 103. The old law was that a party entitled under and having the custody of a deed must keep it safe and undefaced at his peril (*Nichols* v. *Haywood* (1545), 1 Dyer, 59 a; *Michael* v. *Scockwith* (1588), Cro. Eliz. 120; S. C., *sub nom. Pigot's Case* (1614), 11 Co. Rep. 26 b, 27 a). But relief was first given in equity in case of the casual loss or destruction of a deed, the party being allowed, on proof of such loss or destruction, to give secondary evidence of the contents of the deed (*Wilcox* v. *Sturt* (1682), 1 Vern. 77, 78; *Dalston* v. *Coatsworth*, *supra*; *Cowper* v. *Cowper* (*Earl*) (1734), 2 P. Wms. 720, 748—750; *Cookes* v. *Hellier* (1749), 1 Ves. Sen. 234, *per* Lord HARDWICKE, L.C., at p. 235; *Whitfield* v. *Fausset* (1750), 1 Ves. Sen. 387, 389, 390; *Saltern* v. *Melhuish* (1754), 1 Amb. 247). And afterwards a lost deed was allowed to be pleaded at law without a *profert* (*Read* v. *Brookman* (1789), 3 Term Rep. 151). But this did not do away with the jurisdiction of courts of equity to give relief where a deed has been lost or destroyed by accident (*Atkinson* v. *Leonard* (1791), 3 Bro. C. C. 218, 224; *Ex parte Greenway* (1802), 6 Ves. 812, *per* Lord ELDON, L.C., at p. 813; *Bromley* v. *Holland* (1802), 7 Ves. 3, 19, 20; *East India Co.* v. *Boddam* (1804), 9 Ves. 464, 466). It appears, therefore, that this equitable jurisdiction now resides in the High Court of Justice, and that, supposing the old law to have been to some extent reaffirmed by the case of *Davidson* v. *Cooper* (1844), 13 M. & W. 343, 352, Ex. Ch. (see p. 413, note (*l*), *ante*), the rule of equity in the above respect should now prevail (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11); and see *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537).

secondary evidence of what was written therein is admissible (*o*). And it appears upon principle that, if damage of the kind above mentioned be done to a deed by some human being inadvertently and unintentionally, that will not at the present day avoid the deed in any way or preclude its being put in evidence, even though the damage were done by the person entitled under and having the custody of the deed (*p*).

Immaterial alteration.

**745.** An alteration made in a deed, after its execution, in some particular which is not material (*q*) does not in any way affect the validity of the deed; and this is equally the case whether the alteration were made by a stranger (*r*) or by a party to the deed (*s*). Thus the date of a deed may well be filled in after execution (*t*); for a deed takes effect from the date of execution, and is quite good though it be undated (*a*). So also the names of the occupiers of land conveyed may be inserted in a deed after its execution, where the property assured was sufficiently ascertained without them (*b*). And it appears that an alteration is not material which does not vary the legal effect of the deed in its original state, but merely expresses that which was implied by law in the deed as originally written (*c*), or which carries out the intention of the parties already apparent on the face of the deed (*d*), provided that the alteration do

(*o*) See the cases in equity cited in the preceding note; *Medlicot* v. *Joyner* (1669), 1 Mod. Rep. 4; Gilbert, Law of Evidence, 6th ed., 84, 85; *Doe* d. *Gilbert* v. *Ross* (1840), 7 M. & W. 102; *Fitzwalter Peerage* (1844), 10 Cl. & Fin. 946, 952, 953, H. L.; *Moulton* v. *Edmonds* (1859), 1 De G. F. & J. 246, 251 (see title EVIDENCE).

(*p*) See authorities cited at the beginning of note (*n*) on p. 414, *ante*; *Fernandey* v. *Glynn* (1806), 1 Camp. 426, n.; *Raper* v. *Birkbeck* (1812), 15 East, 17, 20; *Wilkinson* v. *Johnston* (1824), 3 B. & C. 428; *Novelli* v. *Rossi* (1831), 2 B. & Ad. 757; *Warwick* v. *Rogers* (1843), 5 Man. & G. 340, 373; *Bamberger* v. *Commercial Credit Mutual Assurance Co.* (1855), 15 C. B. 676, 693, 694. It is submitted that, if in the above respect the old law was reaffirmed by the decision in *Davidson* v. *Cooper* (1844), 13 M. & W. 343, 352; Ex. Ch. (see p. 413, note (*l*), *ante*), the case put falls within the principle on which courts of equity afforded relief, and that, under the present practice, the rule of equity should prevail (see note (*n*) on p. 414).

(*q*) See pp. 411, 412, notes (*r*), (*s*), (*t*), *ante*.

(*r*) *Pigot's Case* (1614), 11 Co. Rep. 26 b, 27 a.

(*s*) *Aldous* v. *Cornwell* (1868), L. R. 3 Q. B. 573, 579; *Crediton* (*Bishop*) v. *Exeter* (*Bishop*), [1905] 2 Ch. 455, 459, overruling *Pigot's Case*, *supra*, on this point.

(*t*) *Keane* v. *Smallbone* (1855), 17 C. B. 179; *Adsetts* v. *Hives* (1863), 33 Beav. 52; *Crediton* (*Bishop*) v. *Exeter* (*Bishop*), *supra*.

(*a*) See p. 382, notes (*o*), (*p*), *ante*.

(*b*) *Adsetts* v. *Hives*, *supra*. It is thought that, where the description contained in the deed is such that it is essential to have the occupiers' names in order to ascertain what is intended to be conveyed, the addition of such names, after execution, would be a material alteration (see pp. 384, 411, 412, *ante*). The alteration of the christian names of one party was held not to avoid a deed (*Re Howgate and Osborn's Contract*, [1902] 1 Ch. 451; compare *Eagleton* v. *Gutteridge* (1843), 11 M. & W. 465).

(*c*) *Waugh* v. *Bussell* (1814), 5 Taunt. 707, 711; *Aldous* v. *Cornwell*, *supra* (adding "on demand" to a promissory note).

(*d*) *Adsetts* v. *Hives*, *supra*. The decision in this case as to filling up the date for redemption seems to go beyond the principle above expressed and to have been a benevolent judgment. It may be usual, but it is not inevitably necessary that a loan on mortgage shall be made repayable in six calendar months' time. But the alterations made in this case were all made

SECT. 5. Avoidance of Deeds.

not otherwise prejudice the party liable thereunder (*e*). An alteration made in a deed may be material as against some party or parties thereto but immaterial as against the other or others (*f*); and where such an alteration has been made in a deed any agreement contained therein may be enforced against the party or parties as to whom the alteration is immaterial (if originally liable thereunder) in the same manner as if the deed had remained unaltered (*g*).

SUB-SECT. 5.—*Discharge of Contracts made by Deed.*

Discharge.

**746.** Contracts made by deed may now be discharged, either before or after breach, in the same manner in all respects as simple contracts (*h*).

Where there are two deeds between the same parties, but of different dates, and containing a covenant to settle the same property, though in different trusts, there being no reference to the first deed in the second deed and no evidence of the intention of the parties, the mere fact that one deed is dated after the other does not make it a supersession of the first (*i*).

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with the consent of the mortgagor, and it does not appear that the objection was taken that a new stamp was necessary (see pp. 412, 413, *ante; Eagleton* v. *Gutteridge* (1843), 11 M. & W. 465, 468, 469).

(*e*) See p. 412, note (*t*), *ante*.

(*f*) *Doe* d. *Lewis* v. *Bingham* (1821), 4 B. & Ald. 672.

(*g*) *Hall* v. *Chandless* (1827), 4 Bing. 123. As to avoidance of deeds for fraud, duress, or undue influence, see title FRAUDULENT AND VOIDABLE CONVEYANCES; for infancy, title INFANTS AND CHILDREN; for lunacy, title LUNATICS AND PERSONS OF UNSOUND MIND; drunkenness, coverture, or illegality for misrepresentation, title MISREPRESENTATION AND FRAUD.

(*h*) *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537. By the common law an obligation arising from a contract made by deed could not be discharged, before breach, without a deed, not even by an agreement to that effect made for valuable consideration, though such an agreement would constitute a contract valid and enforceable at law in all other respects than that of operating as a discharge of the obligation (*Heard* v. *Wadham* (1801), 1 East, 619; *Kaye* v. *Waghorn* (1809), 1 Taunt. 428; *Brymer* v. *Thames Haven Dock and Rail. Co.* (1848), 2 Exch. 549; (1850), 5 Exch. 696, Ex. Ch.; *Berwick Corporation* v. *Oswald* (1853), 1 E. & B. 295; *Spence* v. *Healey* (1853), 8 Exch. 668; *Nash* v. *Armstrong* (1861), 10 C. B. (N. S.) 259). But in equity such an agreement amounted to a valid discharge, and the party who had made it would be restrained from enforcing the obligation at law (*Lanesborough* (*Lady*) v. *Ockshott* (1719), 1 Bro. Parl. Cas. 151; *Hill* v. *Gomme* (1839), 1 Beav. 540; 5 My. & Cr. 250; *Webb* v. *Hewitt* (1857), 3 K. & J. 438). And since the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11), the rule of equity prevails (*Steeds* v. *Steeds*, *supra*). At common law, also, an obligation contracted by deed to pay a certain sum of money could not be discharged, after a breach had occurred, without a deed; it could not, therefore, be discharged by accord and satisfaction made between the parties (see *Nichols's Case* (1595), 5 Co. Rep. 43 a; *Blake's Case* (1605), 6 Co. Rep. 43 b, 44 a; *Neal* v. *Sheaffield* (1610), Cro. Jac. 254; *Preston* v. *Christmas* (1759), 2 Wils. 86; *Rogers* v. *Payne* (1768), 2 Wils. 376; *Braddick* v. *Thompson* (1807), 8 East, 344, 346; Doctor and Student, Dialogue 1, c. 12; stat. (1706) 4 & 5 Ann. c. 3 (c. 16, Ruff.), s. 12, allowing payment to be pleaded in bar of an action to recover a certain sum of money due upon a single bond or by judgment). In equity, however, accord and satisfaction constituted a good discharge of such an obligation, and after accord and satisfaction made the creditor would be restrained from suing on the contract at law (*Webb* v. *Hewitt*, *supra*). Since the Judicature Acts the rule of equity has prevailed in this respect also (*Steeds* v. *Steeds*, *supra*). And see title CONTRACT, Vol. VII., p. 441.

(*i*) *Re Gundry*, *Mills* v. *Mills*, [1898] 2 Ch. 504.

# Part II.—Instruments under Hand only.

## (NON-TESTAMENTARY.)

### SECT. 1.—*Definition of an Instrument under Hand.*

SECT. 1. Definition of an Instrument under Hand.

**747.** An instrument under hand only is a document in writing which either creates or affects legal or equitable rights or liabilities, and which is authenticated by the signature of the author, but is not sealed by him. Such documents are used in a great variety of transactions, including contracts, assignments, acknowledgments of title, and notices. The expression is not limited to documents of a formal character. It extends to any duly signed document which is intended by the author to be the means of producing a result recognised in law (*k*).

Definition.

### SECT. 2.—*Effect of an Instrument under Hand.*

**748.** The effect of an instrument under hand varies according to the transaction for which it is used. If it is concerned with a contract, it may either contain the contract itself or be a memorandum of a contract previously entered into (*l*). In either case the

Effect.

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(*k*) The word "instrument" as applied to a writing may have a still wider scope, and may include documents which affect the pecuniary position of parties although they do not create rights or liabilities recognised in law (see *R.* v. *Riley*, [1896] 1 Q. B. 309, C. C. R., where it was held that a telegram sent in a gambling transaction was an "instrument" within the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 38); but usually it applies to a document under which some right or liability, whether legal or equitable, exists (*Mason* v. *Schuppisser* (1899), 81 L. T. 147, on the phrase "deed, will, or other written instrument," in R. S. C., Ord. 54A, r. 1); compare Married Women's Reversionary Interests Act, 1857 (20 & 21 Vict. c. 57), s. 1; Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28 (interest on a debt payable "by virtue of some written instrument"), as to which, see *Taylor* v. *Holt* (1864), 3 H. & C. 452; *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1893] A. C. 429. "Deed, will, or instrument in writing," in the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 1, includes the printed rules of a savings bank (*R.* v. *Fletcher* (1861), 31 L. J. (M. C.) 206, C. C. R.). A power to appoint by "deed, instrument, or will," includes an instrument under hand, although required to be "executed" (*Brodrick* v. *Brown* (1853), 1 K. & J. 328). The word is frequently used in the Stamp Acts, where it includes every written document (Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), s. 27; Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 122 (1)). Thus in "bond, covenant, or instrument of any kind whatsoever" it includes an agreement in writing not under seal securing periodical payments (*National Telephone Co.* v. *Inland Revenue Commissioners*, [1899] 1 Q. B. 250, C. A.; [1900] A. C. 1). Where signature is not required, it may include an Act of Parliament (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 2 (xiii.); Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 50). It is not, in general, appropriate to describe an order of the court (*Joddrell* v. *Joddrell* (1869), L. R. 7 Eq. 461). As to "instrument" in the Apportionment Act, 1834 (4 & 5 Will. 4, c. 4, c. 22), s. 2, see now "instrument in writing" in the Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2. The word includes a reception order in lunacy (see *Lowe* v. *Fox* (1887), 12 App. Cas. 206). As to the word "writing" including printing and other forms of reproducing words, see p. 426, *post*.

(*l*) Under the Statute of Frauds (29 Car. 2, c. 3), s. 4, either the agreement or a memorandum or note thereof must be in writing. Under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4, a note or memorandum of the bargain is

SECT. 2. Effect of an Instrument under Hand.

Contract.

contract is not enforceable unless it is founded on valuable consideration (*m*). If the writing contains the contract, it is the final expression of the intention of the parties. It supersedes any prior verbal negotiations, and binds the parties to the performance of the terms expressed therein (*n*). If the writing does not itself constitute the contract, but is only a memorandum of a contract previously entered into, the effect is the same, as regards the enforcement of the written terms to the exclusion of parol terms, but the memorandum may be made at a time subsequent to the contract (*o*), though in cases where a memorandum is required to satisfy the Statute of Frauds, it must be made before action brought (*p*).

Assignment.

**749.** If the writing purports to be an assignment, and, having regard to its subject-matter, is capable of operating as such, it will be effectual to pass the property in the subject-matter in accordance with the intention expressed by the assignor, whether it is made with or without valuable consideration (*q*). If, however, it is void at law because it lacks the formalities of a deed, it will operate in equity as a contract to assign, and if founded on valuable consideration, and if in other respects specifically enforceable, it will, so far as the beneficial interest is concerned, be equivalent in general to a legal assignment (*r*). If the writing purports to declare a trust with respect to property belonging to the author, either at law and in equity, or in equity alone, the trust is well created, although there is no consideration (*s*).

Acknowledgment, notice etc.

**750.** If the writing purports to be an acknowledgment of title to land or to money charged on land, or of a specialty or a simple

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required; but in general the written instrument contains and constitutes the contract, and is not merely a memorandum of a previous contract.

(*m*) See p. 357, note (*d*), *ante*, and title CONTRACT, Vol. VII., p. 383.

(*n*) *Leggott* v. *Barrett* (1880), 15 Ch. D. 306, 311, C. A.; and see p. 444, *post*.

(*o*) *Sievewright* v. *Archibald* (1851), 17 Q. B. 103, 107; *Bailey* v. *Sweeting* (1861), 9 C. B. (N. S.) 843, 857; see *Roberts* v. *Tucker* (1849), 3 Exch. 632, 641.

(*p*) *Lucas* v. *Dixon* (1889), 22 Q. B. D. 357, C. A.

(*q*) Where writing under hand only is effective at law as an assignment, the absence of consideration is immaterial; *e.g.*, in the case of shares which, under the articles of the company, are transferable by writing not under seal. And similarly an equitable interest in a trust fund can be assigned by writing under hand without consideration. Nothing remains executory, and there is no occasion for raising the question of consideration (*Harding* v. *Harding* (1886), 17 Q. B. D. 442; *Kekewich* v. *Manning* (1851), 1 De G. M. & G. 176, 188, C. A.; and see title CHOSES IN ACTION, Vol. I., p. 371). The same principle seems to apply to an equitable interest in the proceeds of sale of land, but an equitable estate in the land itself, arising under a trust, is subject to the analogy of legal estates (see Co. Litt. 290 b, note), and in practice is conveyed by deed. If so conveyed, the absence of consideration does not diminish the effect of the conveyance (see *Dickinson* v. *Burrell* (1866), L. R. 1 Eq. 337, at p. 343). And *à fortiori* as to an equity of redemption (see *Casborne* v. *Scarfe* (1737), 1 Atk. 603; 2 White & Tud. L. C., 7th ed., p. 6; *Downe* (*Viscount*) v. *Morris* (1844), 3 Hare, 394); see title FRAUDULENT AND VOIDABLE CONVEYANCES; and see the subject of assignments of equitable interests more fully discussed at p. 375, note (*d*), *ante*. An assignment, effective in law, may require some further formality, such as registration, to give the assignee the full benefit of it.

(*r*) See p. 377, *ante*.

(*s*) See title TRUSTS AND TRUSTEES.

SECT. 2. Effect of an Instrument under Hand.

contract debt, in any of these cases it operates to give a new starting point for the running of the Statutes of Limitation (*t*). And other instruments under hand, such as demands, notices, and consents, operate according to their tenor, provided no further formality is required in the particular case. But as regards all such instruments, whether purporting to operate by way of contract, assignment, or otherwise, it is open to the party against whom the instrument is set up to show that it ought not to bind him on the ground that he was under some disability which made his effective participation in the transaction impossible, or that there were circumstances of fraud, misrepresentation, duress, or mistake which entitle him to treat the document as either void or voidable (*a*).

### SECT. 3.—*For what Transactions an Instrument under Hand is necessary.*

When necessary.

**751.** By the common law an instrument required to be in writing must be under seal (*b*); hence at law the requirement of writing under hand only must be looked for in the statutes, or in the direction or agreement of the parties (*c*). Transactions which at law require a deed are, in general, good in equity when effected by writing under hand, provided they are founded on valuable consideration (*d*). If voluntary, they are in practice always made by deed, though if the transaction is the assignment of an equitable interest, writing under hand only is sufficient, save in the case of equitable estates in land (*e*). Statutory requirements, and such as are imposed by the parties, are recognised in equity as well as at law.

#### SUB-SECT. 1.—*Contracts.*

Contracts required to be evidenced by writing.

**752.** The following contracts require to be evidenced by writing (*f*):—

Special promise by an executor or administrator to answer damages out of his own estate (*g*).

Special promise by one person to answer for the debt, default, or miscarriages of another person (*g*).

Agreement made upon consideration of marriage (*h*).

Contract for sale of lands, tenements, or hereditaments, or any interest in or concerning them (*i*).

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(*t*) See title LIMITATION OF ACTIONS.

(*a*) See p. 359, *ante*, and titles CONTRACT, Vol. VII., p. 391; MISREPRESENTATION AND FRAUD; MISTAKE.

(*b*) See p. 361, *ante*.

(*c*) As where an appointment is required to be made, or a consent given, in writing.

(*d*) See p. 377, *ante*.

(*e*) See pp. 374—377, *ante*, and p. 422, *post*.

(*f*) Agreements not under seal, whether in writing or merely verbal, are technically known as parol contracts (*Rann* v. *Hughes* (1778), 7 Term Rep. 350, n., H. L.; 4 Bro. Parl. Cas. 27).

(*g*) Statute of Frauds (29 Car. 2, c. 3), s. 4; see title EXECUTORS AND ADMINISTRATORS.

(*h*) *Ibid.* This does not include promises to marry (*Cork* v. *Baker* (1717) 1 Stra. 34); see title CONTRACT, Vol. VII., p. 364.

(*i*) Statute of Frauds (29 Car. 2, c. 3), s. 4 (in the statute "contract *or* sale,"

SECT. 3. For what Transactions an Instrument under Hand is necessary.

Agreement which is not to be performed within the space of one year from the making thereof (*k*).

Contract for the sale of any goods of the value of £10 or upwards (*l*).

Bill of exchange, cheque, or promissory note, and acceptance of bill of exchange (*m*).

Contract for loan of money to a person engaged or about to engage in any business when the rate of interest is to vary with the profits, or when the lender is to receive a share of the profits, and when the lender desires not to incur the liabilities of a partner (*n*).

Special agreement made by a solicitor with his client for remuneration in contentious business (*o*), or in conveyancing and other non-contentious business (*p*), either by a gross sum or by commission or percentage, or by salary or otherwise.

Contracts required to be evidenced by writing.

Special contract with a railway or canal company respecting the receiving, forwarding, or delivering of any animals, articles, goods or things (*q*).

Special contract made with a pawnbroker in respect of a pledge where the loan exceeds 40*s*. (*r*).

Agreement between master and seaman (*s*).

Agreement between employer and artificer for deducting from wages the cost of medicine or medical attendance, or fuel supplied to the artificer, or materials, tools, or implements to be employed by the artificer in his trade or occupation, if he is employed in mining, or any hay, corn, or other provender to be consumed by any horse or other beast of burden employed by the artificer in his trade and occupation; or the rent of premises demised to the artificer; or the cost of victuals dressed or prepared under the roof of the employer, and there consumed by the artificer; or money advanced to the artificer for any such purposes (*t*).

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etc.); including an equity of redemption (*Massey* v. *Johnson* (1847), 1 Exch. 241); see titles LANDLORD AND TENANT; SALE OF LAND.

(*k*) Statute of Frauds (29 Car. 2, c. 3), s. 4; *i.e.*, a contract the performance of which is necessarily postponed more than one year (*Lavalette* v. *Riches & Co.* (1908), 24 T. L. R. 336, C. A.); see title CONTRACT, Vol. VII., p. 365.

(*l*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4; writing is not necessary if the buyer accepts part of the goods sold, and actually receives the same, or gives something in earnest to bind the contract, or in part payment; see *Abbott & Co.* v. *Wolsey*, [1895] 2 Q. B. 97, 100, C. A.; and see title SALE OF GOODS.

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 3, 17, 73, 83; see title BILLS OF EXCHANGE ETC., Vol. II., p. 462.

(*n*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (3) (d); see *Pooley* v. *Driver* (1876), 5 Ch. D. 458, and title PARTNERSHIP.

(*o*) Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4; see title SOLICITORS.

(*p*) Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 8; see title SOLICITORS.

(*q*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7; see title RAILWAYS AND CANALS.

(*r*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 24; and as to ordinary contracts of pawn, see *ibid.*, s. 14, and title PAWNBROKERS AND PLEDGES.

(*s*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 113—116; see title SHIPPING AND NAVIGATION.

(*t*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 23; see title MASTER and SERVANT.

SECT. 3. For what Transactions an Instrument under Hand is necessary.

Contract between employer and workman for deduction from wages of any fine; or in respect of bad or negligent work, or injury to the materials or other property of the employer; or for or in respect of the use or supply of materials, tools, or machines, standing room, light, heat, or for or in respect of any other thing to be done or provided by the employer in relation to the work or labour of the workman (*u*).

Memorandum (to be recorded with the county court registrar) of agreement fixing amount of compensation for injury to workman (*a*).

Agreement for payment of any sum of money on account of the earnings of a hackney carriage or metropolitan stage carriage in the metropolis made between the proprietor and the driver or conductor (*b*).

Agreement between the landlord and tenant of an agricultural holding for substituted compensation for improvements mentioned in Part III. of the First Schedule to the Agricultural Holdings Act, 1908 (*c*).

Agreement between landlord and tenant of an agricultural holding excluding s. 22 of the Agricultural Holdings Act, 1908, which makes a year's notice to quit necessary in the case of yearly tenancies (*d*).

Agreement to submit present or future differences to arbitration so as to obtain the benefit of the Arbitration Act, 1889 (*e*).

Memorandum and articles of association of a company under the Companies (Consolidation) Act, 1908 (*f*).

### SUB-SECT. 2.—*Appointments.*

Appointments of property, and to offices.

**753.** Appointments are either appointments of property, appointments of persons to offices or other positions, or appointments of trustees or agents. Appointments of property are frequently authorised to be made by instrument under hand, as well as by deed or will (*g*). An appointment of a trustee may usually be made in writing (*h*), but a vesting declaration of the trust property

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(*u*) Truck Act, 1896 (59 & 60 Vict. c. 44), ss. 1—3; the contract may also be contained in a notice kept constantly visible or accessible. See title MASTER AND SERVANT.

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II., para. 9; Workmen's Compensation Rules, 1907, r. 41 (as altered in 1909).

(*b*) London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 23.

(*c*) 8 Edw. 7, c. 28, s. 4; see title AGRICULTURE, Vol. I., p. 261.

(*d*) *Ibid.*, s. 22; see title AGRICULTURE, Vol. I., p. 241.

(*e*) 52 & 53 Vict. c. 49, ss. 1, 27; see title ARBITRATION, Vol. I., p. 441.

(*f*) 8 Edw. 7, c. 69, ss. 2, 10; though operating for some purposes as deeds, these documents are not deeds (*Re Whitley Partners* (1886), 32 Ch. D. 337, C. A.). There are also other documents relating to associations of persons which, either by statute or by the necessity of the case, must be in writing, such as an instrument of dissolution of a building society (Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32); and in other respects the above list may be capable of extension.

(*g*) See p. 417, note (*k*), *ante*.

(*h*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10 (1), but as to trustees appointed under the Trustees Appointment Acts, 1850 and 1890 (13 & 14 Vict. c. 28; 53 & 54 Vict. c. 19), see p. 371, *ante*; title CHARITIES, Vol. IV., p. 262.

SECT. 3. For what Transactions an Instrument under Hand is necessary.

must be under seal (*i*). An appointment of an agent need not in general be in writing, but sometimes this is expressly required (*k*). And the appointment of a proxy, in company and bankruptcy matters, must be in writing (*l*).

SUB-SECT. 3.—*Trusts.*

Declarations of trusts.

**754.** All declarations or creations of trusts of lands, tenements, or hereditaments must be evidenced by writing (*m*).

SUB-SECT. 4.—*Assignments* (*n*).

Assignments.

**755.** All grants and assignments of any trust or confidence must be in writing (*o*).

All mortgages and charges of real or personal property, if not by deed, must be in writing, unless arising by virtue of deposit of title deeds or delivery of chattels or documents of title (*p*).

Transfers of shares must be in writing under hand, unless a deed is required either by statute or by the articles of association of the company (*q*).

A legal assignment of a legal chose in action must be in writing (*r*).

A legal assignment of a patent must be under seal, but an assignment under hand will create an equitable interest (*s*).

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(*i*) See p. 371, *ante*.

(*k*) *Coles* v. *Trecothick* (1804), 9 Ves. 234, 250; see title AGENCY, Vol. I., p. 160. If the agent is appointed to execute a deed, the appointment must be under seal (p. 363, *ante*). In certain cases an authority in writing is necessary to enable an agent to sign an instrument (p. 430, *post*).

(*l*) See as to companies, Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Table A, clause 65, and title COMPANIES, Vol. V.; as to bankruptcy, Bankruptcy Rules, rr. 245, 246, and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 68.

(*m*) Statute of Frauds (29 Car. 2, c. 3), s. 7. A trust can be declared of personal estate without writing. See title TRUSTS AND TRUSTEES.

(*n*) Under the Statute of Frauds (29 Car. 2, c. 3), ss. 1, 2 leases for three years and upwards must be in writing; but the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3, substituted the requirement of a deed (p. 368, *ante*).

(*o*) Statute of Frauds (29 Car. 2, c. 3), s. 9. This does not in practice dispense with the necessity of a deed in the case of a voluntary assignment of an equitable estate in land arising under a trust, see pp. 375, 418, note (*q*), *ante*. Dispositions of equitable estates under the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), must be by deed (p. 365, *ante*). The interest of a *cestui que trust* in personal estate must be assigned by instrument in writing, though the trust can be created by parol.

(*p*) See titles MORTGAGE; PAWNBROKERS AND PLEDGES. These are securities arising by contract; in addition there are liens arising at law, and therefore not dependent on writing; see title LIEN. In Yorkshire priority for a charge created by deposit of deeds, or for a lien, can only be acquired where there is a memorandum in writing which can be registered (*Re Hobson, Battison* v. *Hobson*, [1896] 2 Ch. 403).

(*q*) Where the articles permit transfer by an instrument in writing, a deed is not necessary (*Re Tahiti Cotton Co., Ex parte Sargent* (1874), L. R. 17 Eq. 273); and an instrument under seal, which is void as such, may be effectual as an instrument in writing (*Ortigosa* v. *Brown* (1878), 47 L. J. (CH.) 168). As to companies subject to the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), see p. 372, *ante*, and title COMPANIES, Vol. V.

(*r*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); and see title CHOSES IN ACTION, Vol. IV., pp. 366, 371. An equitable assignment may be made by parol (*ibid.*, p. 375), and see as to equitable assignments, *ibid.*, p. 374.

(*s*) *Re Casey's Patents*, [1892] 1 Ch. 104, C. A., p. 364, *ante*; see Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 28, and title PATENTS AND INVENTIONS.

SECT. 3. For what Transactions an Instrument under Hand is necessary.

An assignment of copyright in a registered design must be in writing (*a*).

A trade mark can be assigned only in connection with the goodwill of the business concerned, or with the goods for which it has been registered (*b*), and the assignment must be in writing (*c*).

Assignments of copyright in literary matter falling within the Copyright Act, 1842 (*d*), in engravings and prints (*e*), and in paintings, drawings, and photographs (*f*), require to be in writing. The consent of the author of a dramatic work for the representation of the work must be in writing (*g*); as must the consent of the author of a musical composition to its performance (*h*).

An assignment of a policy of life assurance (*i*) or marine insurance must be in writing (*k*).

SUB-SECT. 5.—*Acknowledgments.*

Acknowledgments of title or of debts.

**756.** In order to be effective to prevent a right of action being barred under a Statute of Limitation the following acknowledgments must be in writing:—

An acknowledgment of title to land or to a rentcharge given to an owner out of possession (*l*), or by a mortgagee in possession to the mortgagor (*m*); an acknowledgment of the right to a sum of

(*a*) See Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 52; compare *Jewitt* v. *Eckhardt* (1878), 8 Ch. D. 404; and see title TRADE MARKS AND DESIGNS.

(*b*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 22; see title TRADE MARKS AND DESIGNS.

(*c*) This seems to be implied in the nature of goodwill, and in the provision for registration (*ibid.*, s. 33); but there is no further express provision as to the mode of assignment.

(*d*) This may be by separate instrument or by entry in the register (Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 13). The Act applies to books, to musical compositions, and to dramatic pieces. The instrument need not be under seal (*Leyland* v. *Stewart* (1876), 4 Ch. D. 419). The assignee must be registered before he can sue (*Liverpool General Brokers' Association* v. *Commercial Press Telegram Bureaux*, [1897] 2 Q. B. 1). For the distinction between a publishing agreement and an assignment of copyright, see *Re Jude's Musical Compositions*, [1906] 2 Ch. 595; and as to equitable assignment of copyright in literary matter not yet written, see *Ward, Lock & Co.* v. *Long*, [1906] 2 Ch. 550, and title COPYRIGHT, Vol. VIII., p. 381.

(*e*) Prints Copyright Act, 1777 (17 Geo. 3, c. 57); and see title COPYRIGHT, Vol. VIII., p. 200.

(*f*) Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 3. Assignments of copyright in sculpture must be by deed (Sculpture Copyright Act, 1814 (54 Geo. 3, c. 56), s. 4; see p. 372, *ante*, and title COPYRIGHT, Vol. VIII., p. 207).

(*g*) Dramatic Copyright Act, 1833 (3 & 4 Will. 4, c. 15), s. 2; *Shepherd* v. *Conquest* (1856), 17 C. B. 427; *Eaton* v. *Lake* (1888), 20 Q. B. D. 378, C. A.

(*h*) Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 20, 21, extending the provision mentioned in note (*g*) to musical compositions; see title COPYRIGHT, Vol. VIII., p. 182.

(*i*) Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 5 and Sched.; see title INSURANCE.

(*k*) A marine policy may be assigned by indorsement or in any other customary manner (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 50 (3); see s. 15). The customary manner is in writing. The repealed statute, the Policies of Marine Assurance Act, 1868 (31 & 32 Vict. c. 86), which made the legal assignments of such policies possible, gave a form of assignment in the schedule. This has not been repeated in the consolidating statute.

(*l*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 14.

(*m*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 7.

SECT. 3. For what Transactions an Instrument under Hand is necessary.

money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rentcharge (*n*); or to any legacy (*o*), or share of an intestate's estate (*p*); or to arrears of rent, or of interest in respect of any such sum or legacy (*q*); or to a specialty (*r*) or simple contract debt (*s*).

SUB-SECT. 6.—*Releases.*

Releases and abandonment of rights.

**757.** A release of a right in general requires to be under seal (*t*), but a release under hand only will be effectual on equitable principles if made for valuable consideration (*u*).

Where the business of one life assurance company is transferred to another, an abandonment by a policy holder of the transferring company of his claim against that company must be in writing (*a*).

A renunciation by the holder of a bill of exchange of his rights against the acceptor, or against other parties to the bill, must be in writing, unless, in the case of the acceptor, the bill is delivered up to him (*b*).

A disclaimer of leasehold or other onerous property by a trustee in bankruptcy must be in writing (*c*).

SUB-SECT. 7.—*Notices.*

Notices in writing.

**758.** In numerous cases notices are required to be in writing, as, for instance, notice of an assignment of a chose in action given to the debtor or other person liable (*d*); of an assignment of a

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(*n*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8. Where the sum is also secured by covenant this section applies both to the remedy against the land and to the remedy on the covenant (*Sutton* v. *Sutton* (1882), 22 Ch. D. 511, C. A.).

(*o*) *Ibid.*, s. 8.

(*p*) Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13.

(*q*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42.

(*r*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 5.

(*s*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 1; and see as to acknowledgment in all these cases, title LIMITATION OF ACTIONS.

(*t*) See p. 363, *ante*.

(*u*) See *Taylor* v. *Manners* (1865), 1 Ch. App. 48; but though the release should be in writing, this is not essential (*Steeds* v. *Steeds* (1889), 22 Q. B. D. 537; *Yeomans* v. *Williams* (1865), L. R. 1 Eq. 184; and see p. 363, *ante*).

(*a*) Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), s. 7.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 62. Delivery to the executors of the acceptor would apparently be sufficient, but not to his devisee (*Edwards* v. *Walters*, [1896] 2 Ch. 157, 172, C. A.); see title BILLS OF EXCHANGE ETC., Vol. II., pp. 551, 555.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 192, *ante*.

(*d*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6). But this is only necessary to complete the legal title to the chose in action. Notice is not necessary to complete the equitable title arising under an assignment for value; it is only necessary to prevent a subsequent assignee from gaining priority, and for this purpose it need not be in writing (see title CHOSE IN ACTION, Vol. IV., pp. 379, 381).

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policy of life assurance (*e*); notice served under s. 14 of the Conveyancing and Law of Property Act, 1881, of breach of covenant preparatory to re-entry, and other notices under the same statute (*f*); notice by the tenant for life to trustees of intention to sell under the Settled Land Act, 1882 (*g*); notice to treat under the Lands Clauses (Consolidation) Act, 1845 (*h*); notice to quit under the Landlord and Tenant (Ireland) Act, 1870 (*i*); notice of distress before sale of the goods distrained (*k*); notice to make tenant holding over liable for double rent (*l*), or preparatory to recovery of possession of a small tenement before justices (*m*); notice by the tenant under the Agricultural Holdings Act, 1908, of intention to execute improvements mentioned in Part II. of the First Schedule to the Act (*n*), notice under the same Act by a mortgagee of his intention to deprive the occupier of possession (*o*), and notice by the tenant of his intention to remove a fixture or building (*p*); notice of removal of a pauper with statement of grounds of removal (*q*); and notice of objection to a claim to a parliamentary vote (*r*).

SUB-SECT. 8.—*Miscellaneous Instruments.*

Representations as to character, demand, consent etc.

**759.** Matters required to be in writing include also the following (*a*):—A representation or assurance made or given concerning the character, credit, or dealings of any person to the intent that he may obtain credit, money, or goods (*b*); a demand of payment of a debt so as to make interest run (*c*); declaration of an under-

(*e*) Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 3; see title INSURANCE.

(*f*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 14, 67 (1); see titles LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL.

(*g*) 45 & 46 Vict. c. 38, s. 45; see title SETTLEMENTS.

(*h*) 8 & 9 Vict. c. 18, s. 18; and as to notices not requiring to be under seal though given by a company, see Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 139; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 77; and title COMPANIES, Vol. V.

(*i*) 33 & 34 Vict. c. 46, s. 58.

(*k*) 2 Will. & Mar. sess. 1, c. 5, s. 1; *Wilson* v. *Nightingale* (1846), 8 Q. B. 1034; see title DISTRESS.

(*l*) Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 1; see title LANDLORD AND TENANT.

(*m*) Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), s. 1; and as to deserted premises, see Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 16, and title LANDLORD AND TENANT.

(*n*) 8 Edw. 7, c. 28, s. 3; drainage is the only matter in Part II. of this Act; see title AGRICULTURE, Vol. I., p. 261.

(*o*) *Ibid.*, s. 12; see title AGRICULTURE, Vol. I., p. 263.

(*p*) *Ibid.*, s. 21; see title AGRICULTURE, Vol. I., p. 273.

(*q*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), ss. 79, 81; Poor Law Procedure Act, 1848 (11 & 12 Vict. c. 31), ss. 2, 9; see title POOR LAW.

(*r*) Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), s. 7; see title ELECTIONS.

(*a*) This list must not be taken to be exhaustive; the requirement of writing is very general, and, apart from statute, convenience requires that most matters should be put into writing.

(*b*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 6.

(*c*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28.

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tenant or lodger to prevent distress upon his goods (*d*); consent of a beneficiary to a breach of trust so as to entitle the trustee to indemnity against him (*e*); consent or agreement so as to prevent the acquisition of easements (*f*); consent by the landlord of an agricultural holding to the making by the tenant of an improvement in Part I. of the First Schedule to the Agricultural Holdings Act, 1908 (*g*), or consent by the landlord to payment of compensation by the incoming to the outgoing tenant, so as to entitle the incoming tenant to compensation as though the holding had been continuous (*h*). Moreover, settlements and other instruments frequently require a consent to be given in writing, such as a consent by the tenant for life to a sale, to an advance to a child, or to an investment.

### SECT. 4.—*Form of Instrument under Hand.*

Form and contents.

**760.** The term "instrument in writing" is used to include not only instruments actually written, but all other instruments in which words are permanently represented in visible form, whether by printing, lithography, or otherwise, or partly in one way and partly in another (*i*). The writing may be in ink or pencil, or otherwise (*k*). And the form in which the instrument is expressed is in general immaterial, provided that the intention of the author can be collected from it (*l*), and that it contains all statutory particulars required to be inserted. Thus, a memorandum of a contract to satisfy the Statute of Frauds may be contained in a letter or series of letters (*m*), in an invoice (*n*), in an affidavit (*o*), in a telegram, taken with the written instructions for the telegram signed by the sender (*p*), or in the minutes of a board meeting (*q*).

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(*d*) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 1; see title DISTRESS.

(*e*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 45. Where the beneficiary instigates or requests the breach of trust, writing is not necessary (*Griffith* v. *Hughes*, [1892] 3 Ch. 105; *Re Somerset, Somerset* v. *Poulett* (*Earl*), [1894] 1 Ch. 231, C. A.); see title TRUSTS AND TRUSTEES.

(*f*) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), ss. 1—3; see *Bewley* v. *Atkinson* (1879), 13 Ch. D. 283, C. A., and title EASEMENTS AND PROFITS À PRENDRE.

(*g*) 8 Edw. 7, c. 28, s. 2; see title AGRICULTURE, Vol. I., p. 261.

(*h*) *Ibid.*, s. 7; see title AGRICULTURE, Vol. I., p. 262.

(*i*) *Dench* v. *Dench* (1877), 2 P. D. 60 (will partly lithographed, partly written); see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 20, and p. 379, note (*g*), *ante*.

(*k*) *Geary* v. *Physic* (1826), 5 B. & C. 234 (indorsement of promissory note in pencil).

(*l*) *Brodrick* v. *Brown* (1855), 1 K. & J. 328.

(*m*) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311. But for this purpose the documents must be connected by internal evidence (*Ridyway* v. *Wharton* (1857), 6 H. L. Cas. 238); or must be associated physically, as a letter and its envelope (*Pearce* v. *Gardner*, [1897] 1 Q. B. 688, C. A.). See title CONTRACT, Vol. VII., p. 367.

(*n*) *Schneider* v. *Norris* (1814), 2 M. & S. 286.

(*o*) *Barkworth* v. *Young* (1856), 4 Drew. 1.

(*p*) *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295.

(*q*) *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314, C. A. Similarly,

SECT. 4. Form of Instrument under Hand.

A bill of exchange may be in any words provided it corresponds to the statutory definition (*r*). And generally, when a contract or other matter is required to be in writing, the form is immaterial provided the document contains the particulars of the transaction. Thus, a contract or memorandum in writing under the Statute of Frauds (*s*) or the Sale of Goods Act, 1893 (*t*), must state the parties, either by name or by sufficient descriptive reference (*u*), the subject-matter of the contract (*v*), the consideration (*a*), and the nature of the transaction, that is, whether sale, lease or otherwise, with such additional particulars as will enable the nature of the contract to be ascertained with certainty (*b*), such as, in the case of an agreement for a lease, the commencement (*c*) and length of the term (*d*); and a memorandum must refer to the contract in such a manner as to show the intention of the party who signs to be bound by it (*e*).

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an acknowledgment of title to land or money charged on land, or of a specialty debt, may be contained in a letter (*Stansfield* v. *Hobson* (1852), 16 Beav. 236; 3 De G. M. & G. 620, C. A.), a statement filed in bankruptcy (*Barrett* v. *Birmingham* (1842), 4 I. Eq. R. 537), a petition for sale admitting an incumbrance (*Re West* (1879), 3 L. R. Ir. 77), or other informal document. An acknowledgment of a simple contract debt must be contained in such an instrument—for example a letter—as allows of the implication of a promise to pay (*Tanner* v. *Smart* (1827), 6 B. & C. 603). As to the particulars which may be supplied by parol evidence, see title LIMITATION OF ACTIONS.

(*r*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3; *Ellison* v. *Collingridge* (1850), 9 C. B. 570. See title BILLS OF EXCHANGE ETC., Vol. II., p. 466.

(*s*) 29 Car. 2, c. 3.

(*t*) 56 & 57 Vict. c. 71.

(*u*) *Warner* v. *Willington* (1856), 3 Drew. 523, 530; *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124. See title CONTRACT, Vol. II., p. 372.

(*v*) *Shardlow* v. *Cotterell* (1881), 20 Ch. D. 90; *Plant* v. *Bourne*, [1897] 2 Ch. 281.

(*a*) *Wain* v. *Warlters* (1804), 5 East, 10; 1 Smith, L. C., 11th ed., 323; *Baumann* v. *James* (1868), 3 Ch. App. 508. But in the case of a promise "to answer for the debt, default, or miscarriage of another person" the consideration need not be stated in the written memorandum (Mercantile Law Amendment Act, 1846 (19 & 20 Vict. c. 97), s. 3); see *Morrell* v. *Cowan* (1877), 7 Ch. D. 151, C. A.

(*b*) See *Cox* v. *Middleton* (1854), 2 Drew. 209; *Dolling* v. *Evans* (1867), 36 L. J. (CH.) 474.

(*c*) *Blore* v. *Sutton* (1817), 3 Mer. 237; *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41.

(*d*) *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 22; *Bayley* v. *Fitzmaurice* (1857), 8 E. & B. 664, Ex. Ch.

(*e*) *Warner* v. *Willington* (1856), 3 Drew. 523. Occasionally the statute requiring an instrument to be in writing makes a reference to its form or contents; thus the assignment of copyright under the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 3, must be by "note or memorandum in writing"; a notice of assignment under the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 3, must give the date and purport of the assignment; a notice to trustees and their solicitor of the tenant for life's intention to sell etc. under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 45, must be by registered letter; a notice or other document issued by a company must contain its name in legible characters (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 63 (1)). And as to the contents of a policy of marine insurance, see Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 23; as to an instrument of dissolution of a building society, Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32; and title BUILDING SOCIETIES, Vol. III., p. 392. But in general the form is merely conditioned by the requirement that the instrument shall be in writing and signed.

SECT. 5. Execution of Instrument under Hand.

## SECT. 5.—*Execution of Instrument under Hand.*

Signature.

**761.** An agreement in writing must be signed either by all the parties, or by the party to be charged therewith, in such a manner as to authenticate it (*f*). Under the Statute of Frauds and the Sale of Goods Act, 1893 (*g*), it is sufficient that the writing shall be signed by the party to be charged therewith, and various statutes which require a contract to be in writing refer only to signature by one party (*h*). Other statutes require the writing to be signed by both or all the parties (*i*). Where a statute simply requires an agreement to be in writing, without expressly referring to signature, it may be sufficient if the agreement is signed by the party to be charged therewith (*k*). In other documents the signature must be by the party whose intention gives effect to it; in an appointment, by the appointor; in the creation of a trust, the settlor; in an assignment, the assignor; in an acknowledgment, the person who makes the acknowledgment; in a notice or demand, the person giving the notice or making the demand (*l*). In general, attestation

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(*f*) It was suggested in *Hunter* v. *Parker* (1840), 7 M. & W. 322, that signature was not necessary in a statutory instrument—a bill of sale of a ship under the old Merchant Shipping Act (3 & 4 Will. 4, c. 55), s. 31—unless expressly required; but authentication by signature is practically essential to a document under hand, and is usually essential to give it legal effect.

(*g*) Statute of Frauds (29 Car. 2, c. 3), s. 4; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4. See title CONTRACT, Vol. VII., p. 375. So an agreement for special remuneration under the Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 8, must be signed by the person to be bound thereby (*Re Frape, Ex parte Perrett*, [1893] 2 Ch. 284, C. A.). A consent or agreement in writing under the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), is sufficiently signed by the owner of the dominant tenement (*Bewley* v. *Atkinson* (1879), 13 Ch. D. 283, C. A.).

(*h*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7 (the consignor or person delivering goods for carriage); Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 23 (the artificer); Truck Act, 1896 (59 & 60 Vict. c. 44), ss. 1, 2, 3 (the workman); London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 23 (the driver or conductor). A marine insurance policy must be signed by or on behalf of the insurer (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 24).

(*i*) A contract to lend money in consideration of the receipt of a share of profits, without incurring partnership liabilities, must be signed by all the parties (Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (3) (d)). A special contract with a pawnbroker is made by delivery of a special contract pawn-ticket, signed by the pawnbroker, and a duplicate signed by the pawner (Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 24); a seaman's agreement must be signed by the master before the seaman signs (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 114).

(*k*) Opinions on this point vary. In cases on the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4, it has been said that the agreement in writing for special remuneration must be signed by both parties (*Re Lewis, Ex parte Munro* (1876), 1 Q. B. D. 724; *Pontifex* v. *Farnham* (1892), 41 W. R. 238); but on the analogy of the Statute of Frauds it has been decided that signature by the client is sufficient (*Re Thompson, Ex parte Baylis*, [1894] 1 Q. B. 462; *Re Jones*, [1895] 2 Ch. 719; [1896] 1 Ch. 222, C. A.; *Bake* v. *French*, [1907] 2 Ch. 215). A submission to arbitration under the Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 1, 27, must, it seems, be signed by both parties (*Caerleon Tinplate Co.* v. *Hughes* (1891), 60 L. J. (Q. B.) 640); see title ARBITRATION, Vol. I., p. 441, note (*n*).

(*l*) In some cases the signature is prescribed by statute. An instrument creating a trust must be signed by the party entitled to declare the trust (Statute of Frauds (29 Car. 2, c. 3), s. 7; see *Dye* v. *Dye* (1884), 13 Q. B. D.

is not required for an instrument under hand, but in some cases it is rendered necessary by statute (*m*). The place and manner of signature are immaterial, provided that the signature is inserted in such a manner as to authenticate the document (*n*), and that it can be identified as representing the name of the party (*o*).

Although a contract has been signed in such a form as to appear unconditional, parol evidence may be adduced to show that it was not intended to take effect until the performance of a condition precedent (*p*).

Signature by agent.

**762.** In general, where a contract or other document is required to be in writing, a signature by an agent on behalf of the party to be bound is sufficient (*q*), and it is not necessary that the agent

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147, C. A.); a grant or assignment of a trust, by the party granting (*ibid.*, s. 9); an assignment of a chose in action, by the assignor (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6)); an assignment of copyright in a print or engraving (Prints Copyright Act, 1777 (17 Geo. 3, c. 57)), or in paintings, drawings, and photographs (Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 3), by the proprietor; a licence to perform a dramatic piece or musical composition, by the author or proprietor (Dramatic Copyright Act, 1833 (3 & 4 Will. 4, c. 15), s. 2; Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 20, 21). A statement of the grounds of removal of a pauper under the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 79, must be under the hands of the overseers or guardians. An objection to a parliamentary voter under the Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), s. 7, must be signed by the person objecting.

(*m*) Thus, an agreement under the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 23, must be signed by the driver in the presence of a witness; assignments under the Prints Copyright Act, 1777 (17 Geo. 3, c. 57), must be attested by two witnesses; an assignment of a policy of life insurance must be attested (Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), Schedule); and transfers of shares, although under hand only, are usually attested.

(*n*) *Johnson* v. *Dodgson* (1837), 2 M. & W. 653. Thus, where an instrument is in the handwriting of the party to be charged, it is sufficient if his name is inserted at the commencement (*Ogilvie* v. *Foljambe* (1817), 3 Mer. 53, 62; *Propert* v. *Parker* (1830), 1 Russ. & M. 625; *Lobb* v. *Stanley* (1844), 5 Q. B. 574; *Holmes* v. *Mackrell* (1858), 3 C. B. (N. S.) 789); compare *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295 (name at head of telegram); *Schneider* v. *Norris* (1814), 2 M. & S. 286; *Sarl* v. *Boudillon* (1856), 1 C. B. (N. S.) 188 (entry of names of sellers and buyers in order book); *Durrell* v. *Evans* (1862), 1 H. & C. 174, Ex. Ch. The name of a person signing as witness may authenticate the instrument if he cannot be a witness (*Coles* v. *Trecothick* (1804), 9 Ves. 234, 251; *Barkworth* v. *Young* (1856), 4 Drew. 114); compare *Gosbell* v. *Archer* (1835), 2 Ad. & El. 500. And a signature may authenticate a memorandum added afterwards (*Bluck* v. *Gompertz* (1852), 7 Exch. 862). But a signature not introduced so as to authenticate the entire instrument will not suffice (*Caton* v. *Caton* (1867), L. R. 2 H. L. 127; *Stokes* v. *Moore* (1786), 1 Cox, Eq. Cas. 219). See title CONTRACT, Vol. VII., p. 375.

(*o*) Signature in pencil is sufficient (*Schneider* v. *Norris* (1814), 2 M. & S. 286), and by initials (*St. John* (*Lord*) v. *Boughton* (1838), 9 Sim. 219), or by a mark (*Baker* v. *Dening* (1838), 8 Ad. & El. 94); but as to an acknowledgment, see *Re Clendinning* (1859), 9 I. Ch. R. 284. Where a party holds the pen and another traces his name, it is his signature (*Harrison* v. *Elvin* (1842), 3 Q. B. 117; *Helshaw* v. *Langley* (1841), 11 L. J. (CH.) 17).

(*p*) *Wallis* v. *Littell* (1861), 11 C. B. (N. S.) 369, at p. 375; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25; see *Furness* v. *Meek* (1857), 27 L. J. (EX.) 34. See title CONTRACT, Vol. VII., p. 527; and pp. 387—390, *ante*.

(*q*) *Re Whitley Partners* (1886), 32 Ch. D. 337, C. A.; *Morton* v. *Copeland* (1855), 16 C. B. 517 (consent for representation of dramatic piece under the Dramatic Copyright Act, 1833 (3 & 4 Will. 4, c. 15), s. 2). A submission to

SECT. 5. Execution of Instrument under Hand.

should be appointed in writing (*r*). In some cases, however, a statute requires that the signature should be that of the party himself, and then an agent cannot sign for him (*s*); in others, signature by an agent is expressly allowed (*t*), and occasionally with the requirement that he shall be authorised in writing (*u*). An agent can either sign the name of his principal or his own name, but in the latter case the fact of the agency should appear on the document, or he will be liable as a principal (*a*).

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arbitration may be signed by agents (see title ARBITRATION, Vol. I., p. 441); and so apparently may an instrument of dissolution of a building society, which requires the consent of a specified majority of the members testified "by their signatures" (Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32; *Dennison* v. *Jeffs*, [1896] 1 Ch. 611); see title BUILDING SOCIETIES, Vol. III., p. 392).

(*r*) See title AGENCY, Vol. I., pp. 150, 156.

(*s*) Personal signature is necessary when a statute requires that the instrument shall be signed by a particular party, without adding "or his agent"; such as contracts with seamen under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 114; with artificers or workmen under the Truck Acts, 1831 and 1896 (1 & 2 Will. 4, c. 37, s. 23; 59 & 60 Vict. c. 44, ss. 1—3); with a driver or conductor under the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 23. A representation as to character must be signed by the "party to be charged therewith" (Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14)), and this requires personal signature (*Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301; *Hirst* v. *West Riding Union Banking Co.*, [1901] 2 K. B. 560, C. A.). An acknowledgment of title to land given by a person in possession to the owner (Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 14), or by a mortgagee in possession to the mortgagor (Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57, s. 7), must be given by the person in possession or mortgagee personally (*Ley* v. *Peter* (1858), 3 H. & N. 101). And a disclaimer by a trustee in bankruptcy under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55, must be signed by him personally (*Wilson* v. *Willani* (1880), 5 Ex. D. 155). Sometimes the requirement of personal signature is made clearer by enacting that the party must sign with his own hand (Prints Copyright Act, 1777 (17 Geo. 3, c. 57); so "his own consent in writing," which is necessary for the joinder of a plaintiff under R. S. C., Ord. 16, r. 11, requires actual signature by the party (*Fricker* v. *Van Grutten*, [1896] 2 Ch. 649, C. A.).

(*t*) Under the Statute of Frauds (29 Car. 2, c. 3), s. 4, and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4, the signature may be by an agent "lawfully authorised"; and an agent may sign under the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (3) (d); the Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 8; and the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 24. All acknowledgments under the Statutes of Limitation (except those mentioned in note (*s*), *supra*) may be signed by an agent—namely, Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8 (money charged on land, judgment, legacy); Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13 (intestates' estates); Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42 (arrears of rent or interest); Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 5 (specialty debts); Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 13 (simple contract debts). An abandonment of a claim by a life policy-holder against an amalgamated company may be signed by an agent (Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), s. 7).

(*u*) This is so under ss. 1 and 3 of the Statute of Frauds (29 Car. 2, c. 3) (interests in land); and under the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 3, an agent to sign a "note or memorandum in writing" of an assignment of copyright must be appointed for the purpose in writing.

(*a*) See title AGENCY, Vol. I., pp. 219—221. In general, since an agent cannot delegate his authority, his personal signature is required. Hence, an auctioneer's clerk cannot sign on behalf of a purchaser (*Bell* v. *Balls*, [1897] 1 Ch. 663). But delegation of the act of signing to a clerk may be permitted by the ordinary course of business (*Johnson* v. *Osenton* (1869), L. R. 4 Exch.

SECT. 5. Execution of Instrument under Hand.

**763.** Any contract which, if made between private persons, would be required to be in writing, signed by the parties to be charged therewith, may be made on behalf of a company subject to the Companies (Consolidation) Act, 1908 (*b*), in writing signed by any person acting under its authority, express or implied. Any document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorised officer of the company, and need not be under its common seal (*c*).

Execution on behalf of company.

SECT. 6.—*Alteration and Cancellation of Instrument under Hand.*

**764.** A writing which is intended to be under hand only can be altered by erasure, or interlineation, or otherwise, before it is signed, but it lies upon the party who puts the instrument in suit to explain the alteration and show when it was made (*d*).

Alteration before execution.

**765.** An alteration in a material part of an instrument under hand made by, or with the consent of, one party thereto, but without the consent of the other party, makes the instrument void to this extent, that the party responsible for the alteration cannot enforce the instrument against a party not responsible. But the latter party can enforce it against the former, if he can prove the original form of the instrument; and where the instrument operates as a conveyance, the alteration will not prejudice it in this respect (*e*).

Material alteration by one party.

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107); see *Brown* v. *Tombs*, [1891] 1 Q. B. 253 (notice of claim to parliamentary vote).

(*b*) 8 Edw. 7, c. 69, s. 76 (1) (ii.); see s. 77 as to making, indorsement, and acceptance of bills of exchange and promissory notes; these acts may be done in the name of, or by or on behalf or on account of, the company by any person acting under its authority; see titles BILLS OF EXCHANGE ETC., Vol. II., p. 492; COMPANIES, Vol. V.

(*c*) *Ibid.*, s. 117.

(*d*) The presumption that alterations are made before the execution of the instrument, which arises in the case of a deed (see p. 411, *ante*), does not apply to an instrument under hand, although the reason for the presumption, namely, that the instrument cannot be altered, after it is executed, without fraud or wrong, and that the presumption is against fraud or wrong (*Doe* d. *Tatum* v. *Catomore* (1851), 16 Q. B. 745; and see p. 411, *ante*), seems to exist equally in each case. But in the case of other instruments than deeds, the principle has prevailed that it lies on the party who seeks to enforce an altered instrument to prove the circumstances under which the alteration took place (*Henman* v. *Dickinson* (1828), 5 Bing. 183; *Knight* v. *Clements* (1838), 8 Ad. & El. 215; *Carriss* v. *Tattersall* (1841), 2 Man. & G. 890; *Clifford* v. *Parker* (1841), 2 Man. & G. 909; *Doe* d. *Tatum* v. *Catomore, supra*, p. 746). If, however, the obligation to be enforced does not arise under the altered instrument, but the instrument is introduced merely to explain the obligation, and the alteration does not affect its use for this purpose, no explanation of the alteration need be given (*Falmouth (Earl)* v. *Roberts* (1842), 9 M. & W. 469; *Hutchins* v. *Scott* (1837), 2 M. & W. 809). See also title CONTRACT, Vol. VII., p. 424.

(*e*) The effect of an alteration of an instrument in writing is the same as in the case of deeds. The principle established by *Pigot's Case* (1614), 11 Co. Rep. 26 b, for deeds was applied to bills of exchange by *Master* v. *Miller* (1791), 4 Term Rep. 320; (1793) 2 Hy. Bl. 140, Ex. Ch.; 1 Smith, L. C., 11th ed., p. 767; see *Burchfield* v. *Moore* (1854), 3 E. & B. 683; *Gardner* v. *Walsh* (1855), 5 E. & B. 83, 90; and the principle was subsequently extended to other instruments, such as bought and sold notes (*Powell* v. *Divett* (1812), 15 East, 29; *Mollett* v. *Wackerbarth* (1847), 5 C. B. 181); guarantees (*Davidson* v. *Cooper* (1843), 11 M. & W. 778, 795; (1844) 13 M. & W. 343, Ex. Ch.; *Bank of Hindostan, China and*

SECT. 6. Alteration and Cancellation of Instrument under Hand.

An alteration made while the instrument is in the custody of one party, although not made with his knowledge or consent, has the same effect in avoiding the instrument as if made by him, on the principle that he who has the custody of an instrument made for his benefit is bound to preserve it in its original state (*f*). But it is doubtful whether this rule applies when the alteration is made against the will and in fraud of the party having the custody (*g*); and an alteration made by a stranger, when the instrument is in the custody of neither party, does not affect the document, if its original state can be proved (*h*).

Material alteration by stranger.

Alteration by accident or mistake.

To avoid the instrument the alteration must be intentional; if it is due to accident or to mistake it will not prejudice the party responsible for the custody of the instrument (*i*). But an intentional alteration made under a mistake as to the legal effect of the instrument avoids it (*k*).

Alteration with consent.

**766.** An alteration in an instrument under hand made with the consent of all parties does not avoid it, and it takes effect as altered (*l*); but unless the alteration is merely the correction of a

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*Japan* v. *Smith* (1867), 36 L. J. (C. P.) 241); charterparties (*Crockewit* v. *Fletcher* (1857), 1 H. & N. 893); building contracts (*Pattinson* v. *Luckley* (1875), L. R. 10 Exch. 330); Bank of England notes (*Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555, C. A.); reception order in lunacy (*Lowe* v. *Fox* (1887), 12 App. Cas. 206). The rules on the subject have already been stated (see pp. 411 *et seq.*, *ante*), and they are repeated here in abbreviated form, with such authorities as are specially applicable to instruments under hand. The rules with regard to alteration of a bill of exchange are now contained in the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 64 (1); see title BILLS OF EXCHANGE ETC., Vol. I., p. 552. As to what alterations in a bill of exchange are material, see s. 64 (2), *ibid.*, pp. 556, 557; as to what alterations are material in other instruments, see p. 411, *ante*. Stated generally, the principle is, that an alteration is material if it alters the legal effect of the instrument, but not if it adds something that would be implied, or supplies an obvious clerical omission (*Aldous* v. *Cornwell* (1868), L. R. 3 Q. B. 573—"on demand" inserted in a promissory note which expressed no time for payment); and it is also material if, without altering the legal effect, it affects the use of the instrument, as the alteration of the number of a Bank of England note (*Suffell* v. *Bank of England, supra;* see *Leeds Bank* v. *Walker* (1883), 11 Q. B. D. 84; and compare *Re Howgate and Osborn's Contract*, [1902] 1 Ch. 451). The party who has altered the instrument and thus loses his remedy on it does not lose his remedy on the original consideration, unless he has by the alteration deprived the other party of some remedy over (*Sutton* v. *Toomer* (1827), 7 B. & C. 416; *Atkinson* v. *Hawdon* (1835), 2 Ad. & El. 628; compare *Alderson* v. *Langdale* (1832), 3 B. & Ad. 660). The innocent party can only enforce the contract subject to any restrictions or conditions originally contained in it (*Pattinson* v. *Luckley* (1875), L. R. 10 Exch. 330).

(*f*) *Davidson* v. *Cooper* (1844), 13 M. & W. 343, Ex. Ch.; *Bank of Hindostan, China and Japan* v. *Smith, supra;* see *Pattinson* v. *Luckley, supra;* and remarks of BLACKBURN, J., in *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802, at p. 813.

(*g*) *Lowe* v. *Fox* (1887), 12 App. Cas. 206, *per* Lord HERSCHELL, at p. 217.

(*h*) *Henfree* v. *Bromley* (1805), 6 East, 309.

(*i*) See p. 414, *ante*. As to mistake, see also *Raper* v. *Birkbeck* (1812), 15 East, 17; *Wilkinson* v. *Johnston* (1824), 3 B. & C. 428; *Prince* v. *Oriental Bank* (1878), 3 App. Cas. 325, P. C.

(*k*) *Bank of Hindostan, China and Japan* v. *Smith, supra.*

(*l*) See *Hamelin* v. *Bruck* (1846), 9 Q. B. 306; *Downes* v. *Richardson* (1822), 5 B. & Ald. 674.

SECT. 6. Alteration and Cancellation of Instrument under Hand.

mistake, and is intended to carry out the original intention of the parties, the result will be to create a fresh contract and so to necessitate restamping (*m*). But no fresh stamp is necessary if the alteration is made before the instrument is signed by all parties (*n*), or, in the case of a negotiable instrument, before it is issued (*o*). An alteration which is not material does not affect the operation of the instrument by whomsoever it is made (*p*).

Cancellation.

**767.** An instrument under hand is cancelled and made void by striking through the signature with the intention that it shall become void; and this may be done by or under the direction of anyone who is entitled to the benefit of the instrument (*q*); but a cancelling by an agent without authority has no effect (*r*).

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# Part III.—Interpretation of Deeds and Non-Testamentary Instruments.

## SECT. 1.—*General Rules of Interpretation.*

Object of interpretation.

**768.** The object of all interpretation of a written instrument is to discover the intention of the author, the written declaration of whose mind it is always considered to be (*s*). Consequently, the construction must be as near to the minds and apparent intention of the parties as is possible, and as the law will permit (*t*). The same construction is placed on the words of a contract under seal as on those of a contract not under seal (*a*); on mercantile contracts

(*m*) That a substantial alteration necessitates a new stamp, see *Bowman* v. *Nichol* (1794), 5 Term Rep. 537; *Knill* v. *Williams* (1809), 10 East, 431; *Bathe* v. *Taylor* (1812), 15 East, 412; *Atherstone* v. *Bostock* (1841), 2 Man. & G. 511; but not an alteration made to correct a mistake (*Cole* v. *Parkin* (1810), 12 East, 471; *Robinson* v. *Touray* (1813), 1 M. & S. 217; *Sawtell* v. *Loudon* (1814), 5 Taunt. 359; *Jacob* v. *Hart* (1817), 6 M. & S. 142; *Byrom* v. *Thompson* (1839), 11 Ad. & El. 31).

(*n*) See p. 413, *ante*.

(*o*) *Downes* v. *Richardson* (1822), 5 B. & Ald. 674; *Scholfield* v. *Londesborough* (*Earl*), [1894] 2 Q. B. 660. As to altered cheques, see title BANKERS AND BANKING, Vol. I., p. 615.

(*p*) See p. 415, *ante;* and as to marine insurance policies, see *Sanderson* v. *Symonds* (1819), 1 Brod. & Bing. 426.

(*q*) See p. 409, *ante; Bamberger* v. *Commercial Credit Mutual Assurance Co.* (1855), 15 C. B. 676, 694; *Ward* (*Lord*) v. *Lumley* (1860), 5 H. & N. 656. These were cases of deeds, but it is *d fortiori* as to instruments under hand. As to the cancellation of bills of exchange, see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 63, and title BILLS OF EXCHANGE ETC., Vol. II., p. 555.

(*r*) *Bank of Scotland* v. *Dominion Bank*, [1891] A. C. 592.

(*s*) *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, *per* PLUMER, M.R., at p. 91; *Evans* v. *Vaughan* (1825), 4 B. & C. 261, *per* ABBOTT, C.J., at p. 266. See also title CONTRACT, Vol. VII., p. 509.

(*t*) Shep. Touch. 86; *Throckmerton* v. *Tracy* (1555), 1 Plowd. 145, *per* STAUNDFORD, J., at p. 160; *Hilbers* v. *Parkinson* (1883), 25 Ch. D. 200, *per* PEARSON, J., at p. 203; "As far as it may stand with the rule of law, it is honourable for all judges to judge according to the intention of the parties, and so they ought to do" (Co. Litt. 314 b).

(*a*) *Seddon* v. *Senate* (1810), 13 East, 63, *per* Lord ELLENBOROUGH, C.J., at p. 74.

SECT. 1. General Rules of Interpretation.

and other instruments (*b*); and documents receive the same construction in equity as at law (*c*). When a general principle for the construction of an instrument has once been laid down, the court must make the most accurate application of it to the circumstances of the particular case, notwithstanding that it may have been applied differently in other cases (*d*).

The intention is the expressed intention.

**769.** But the intention must be gathered from the written instrument (*e*). The function of the court is to ascertain what the parties meant by the words they have used (*f*); to declare the meaning of what is written in the instrument, not of what was intended to have been written (*g*); to give effect to the intention as expressed (*h*), the expressed meaning being, for the purpose of interpretation, equivalent to the intention (*i*). It is not permissible to guess at the intention of the parties and substitute the presumed for the expressed intention (*k*). And the ordinary rules of construction must be applied, although by so doing the real intention of the parties may in some instances be defeated. Such a course tends to establish a greater degree of certainty in the administration of the law (*l*). It is not necessary, however, for the intention to be stated in express words; if the intention is clear on the whole instrument, effect will be given to it even without such express statement (*m*).

Words to be taken in ordinary sense.

**770.** The words of a written instrument must in general be taken in their ordinary sense (*n*); but if the provisions and

(*b*) *Southwell* v. *Bowditch* (1876), 1 C. P. D. 374, at p. 376, C. A.

(*c*) *Gladstone* v. *Birley* (1817), 2 Mer. 401; *Re Terry and White's Contract* (1886), 32 Ch. D. 14, C. A., *per* Lord ESHER, M.R., at p. 21; see *Pentland* v. *Stokes* (1812), 2 Ball & B. 68, at p. 73.

(*d*) *Browning* v. *Wright* (1799), 2 Bos. & P. 13, *per* Lord ELDON, C.J., at p. 24.

(*e*) *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L., *per* COLERIDGE, J., at p. 526, *per* PARKE, B., at p. 556; *Rickman* v. *Carstairs* (1833), 5 B. & Ad. 651, *per* DENMAN, C.J., at p. 663.

(*f*) *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484, *per* Lord HALSBURY, L.C., at p. 491; *Barton* v. *Fitzgerald* (1812), 15 East, 530, *per* Lord ELLENBOROUGH, C.J., at p. 541.

(*g*) See cases cited in note (*e*), *supra*, and *Marshall* v. *Berridge* (1881), 19 Ch. D. 233, C. A.

(*h*) *Hayne* v. *Cummings* (1864), 16 C. B. (N. S.) 421, 427; *Monypenny* v. *Monypenny* (1858), 4 K. & J. 174, 182; *McConnel* v. *Murphy* (1873), L. R. 5 P. C. 203, 219.

(*i*) *Shore* v. *Wilson*, *supra*, *per* COLERIDGE, J., at p. 525. Though where the nature of the deed and the relation of the parties, as father and child, gives a clue to the "natural intention," the court will struggle with the language to give effect to it (*Hope* v. *Clifden* (*Lord*) (1801), 6 Ves. 499, *per* Lord ELDON, L.C., at p. 509; *Clayton* v. *Glengall* (*Earl*) (1841), 1 Dr. & War. 1, *per* SUGDEN, L.C., at p. 17).

(*k*) *Smith* v. *Lucas* (1881), 18 Ch. D. 531, *per* JESSEL, M.R., at p. 542; *Monypenny* v. *Monypenny* (1861), 9 H. L. Cas. 114, *per* Lord WENSLEYDALE, at p. 146; *Re Meredith, Ex parte Chick* (1879), 11 Ch. D. 731, C. A., *per* BRETT, L.J., at p. 739.

(*l*) *Mallan* v. *May* (1844), 13 M. & W. 511, *per* POLLOCK, C.B., at p. 517.

(*m*) "I am to consider the whole intrument, and if there appear a plain intention to give interest, then, though there should be no express words to that effect, and this is the case of a deed, yet I am bound to give it that construction" (*Clayton* v. *Glengall* (*Earl*), *supra*, *per* SUGDEN, L.C., at p. 14).

(*n*) "In their plain, ordinary, and popular sense"; see judgment of Lord ELLENBOROUGH, C.J., in *Robertson* v. *French* (1813), 4 East, 130, at p. 135, quoted p. 437, note (*k*), *post*.

expressions are contradictory, and there are grounds, appearing on the face of the instrument, affording proof of the real intention of the parties, that intention will prevail against the obvious and ordinary meaning of the words (*o*). And where the literal construction would lead to an absurd result, and the words used are capable of being interpreted so as to avoid this result, the literal construction will be abandoned (*p*). So, too, considerations of inconvenience may be admitted when the construction of the document is ambiguous (*q*). But if the intention is clearly and unequivocally expressed, then, however capricious it may be, the court is bound by it, unless it is plainly controlled by other parts of the instrument (*r*).

Rule.

Hence the following rule :—In construing all written instruments the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther (*s*). Or more shortly :—The instrument must be construed according to its literal import, unless there is something in the subject or context which shows that this cannot be the meaning of the words (*t*).

Ordinary meaning determined by common usage.

**771.** The ordinary meaning of a word—usually called its literal or primary meaning—is not necessarily its etymological

(*o*) *Lloyd* v. *Lloyd* (1837), 2 My. & Cr. 192, *per* Lord COTTENHAM, L.C., at p. 202, who said further : "If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention." And not too much regard must be paid to the natural and proper meaning of the words to prevent the intention (Shep. Touch. 86).

(*p*) "If a rational exposition can be given consistent with a fair interpretation of the language used, the court would then relinquish its most valuable powers if it did not abandon a construction, which, although more consonant with the literal interpretation of the words written, leads to a capricious and irrational result" (*Laird* v. *Tobin* (1830), 1 Mol. 543, *per* HART, L.C., at p. 547).

(*q*) *Re Alma Spinning Co., Bottomley's Case* (1880), 16 Ch. D. 681, *per* JESSEL, M.R., at p. 686.

(*r*) *Hume* v. *Rundell* (1824), 2 Sim. & St. 174, *per* LEACH, V.-C., at p. 177 ; *Abbott* v. *Middleton* (1858), 7 H. L. Cas. 68, *per* Lord CRANWORTH, L.C., at p. 89 ; *Bathurst* v. *Errington* (1877), 2 App. Cas. 698, at p. 709 ; *Re Whitmore, Walters* v. *Harrison*, [1902] 2 Ch. 66, C. A., at p. 70.

(*s*) *Grey* v. *Pearson* (1857), 6 H. L. Cas. 61, *per* Lord WENSLEYDALE, at p. 106 ; see also *per* Lord CRANWORTH, L.C., at p. 78. This rule Lord WENSLEYDALE called the golden rule of construction (see *Caledonian Rail. Co.* v. *North British Rail. Co.* (1881), 6 App. Cas. 114, *per* Lord BLACKBURN, at p. 131 ; *Re Levy, Ex parte Walton* (1881), 17 Ch. D. 746, C. A., *per* JESSEL, M.R., at p. 751 ; *Spencer* v. *Metropolitan Board of Works* (1882), 22 Ch. D. 142, C. A., *per* CHITTY, J., at p. 148), and he enunciated it on several occasions ; see *Roddy* v. *Fitzgerald* (1858), 6 H. L. Cas. 823, at p. 876 ; *Abbott* v. *Middleton, supra*, at p. 114, and cases there cited ; *Thellusson* v. *Rendlesham* (1859), 7 H. L. Cas. 429, at p. 519. It was adopted by Lord WENSLEYDALE from the judgment of BURTON, J., in *Warburton* v. *Loveland* d. *Ivie* (1828), 1 Hud. & B. 623, Ex. Ch. See also *Bland* v. *Crowley* (1851), 6 Exch. 522, *per* PARKE, B., at p. 529 ; *Rhodes* v. *Rhodes* (1882), 7 App. Cas. 192, P. C., at p. 205 ; *Diederichsen* v. *Farquharson Brothers*, [1898] 1 Q. B. 150, C. A., *per* RIGBY, L.J., at p. 159).

(*t*) *Lowther* v. *Bentinck* (1874), L. R. 19 Eq. 166, *per* JESSEL, M.R., at p. 169. "You may depart from the literal meaning of words, if reading the words literally leads to an absurdity" (*Wallis* v. *Smith* (1882), 21 Ch. D. 243, C. A., at p. 257).

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meaning (*a*), but that which the ordinary usage of society applies to it (*b*). Hence, under the above rule, this is the meaning which *primâ facie* is to be given to the word in construing the instrument in which it occurs (*c*). Such meaning is not to be capriciously interfered with, and when it is interfered with, the interference must be as slight as possible (*d*).

Technical words construed in technical sense.

**772.** Where technical words occur in a document, whether they are technical scientific or technical legal terms, it is assumed that they are used in their technical sense, and *primâ facie* this is the meaning which such words must bear (*e*). But paramount regard must be had to the meaning and intention of the grantor, in preference to the technical meaning. Hence the technical meaning of legal terms will give way to the popular meaning if an intention to this effect is manifested on the face of the instrument (*f*). Technical words of limitation, however, will have their strict legal effect (*g*).

Special local meaning.

**773.** Where it appears that a word or phrase has a special meaning in the district in which the person using it resides, or among the class to which he belongs, so that in using it he probably used it in this special sense, then such special meaning takes the place of the ordinary meaning for the purpose of construing the document, and is the meaning which *primâ facie* the word or phrase must bear (*h*). For a special meaning of this nature to be ascribed

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(*a*) "Etymology is a very unsafe guide to meaning" (*Hext* v. *Gill* (1872), 7 Ch. App. 699, *per* WICKENS, V.-C., at p. 705, n.).

(*b*) *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L., *per* COLERIDGE, J., at p. 527.

(*c*) *Holt & Co.* v. *Collyer* (1881), 16 Ch. D. 718, *per* FRY, J., at p. 720; compare *Bain* v. *Cooper* (1842), 9 M. & W. 701, *per* Lord ABINGER, C.B., at p. 708; *Re Bedson's Trusts* (1885), 28 Ch. D. 523, C. A., *per* BRETT, M.R., at p. 525.

(*d*) *Lucena* v. *Lucena* (1877), 7 Ch. D. 255, C. A., *per* JESSEL, M.R., at p. 260.

(*e*) *Shore* v. *Wilson*, *supra*, *per* COLERIDGE, J., at p. 525; *Holt & Co.* v. *Collyer*, *supra*; *Laird* v. *Briggs* (1881), 19 Ch. D. 20, C. A., *per* JESSEL, M.R., at p. 34; *Leach* v. *Jay* (1877), 6 Ch. D. 497, "Technical words must have their technical meaning given to them unless you can find something in the context to overrule them"; see *Holloway* v. *Holloway* (1800), 5 Ves. 399, 401; and compare *Roddy* v. *Fitzgerald* (1858), 6 H. L. Cas. 823, 877, as to technical words in wills. (See title WILLS.) As to admitting evidence of technical meaning, see p. 449, *post*.

(*f*) See *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1821), 2 Jac. & W. 1, *per* PLUMER, M.R., at p. 92; *Leach* v. *Jay*, *supra*; and compare *Hill* v. *Grange* (1556), 1 Plowd. 168, 170: "It is the office of judges to take and expound the words which common people use to express their meaning according to their meaning."

(*g*) See *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*), *supra*, at p. 93. Occasionally the legal effect of limitations to trustees has been altered to suit the general intention of the deed. Thus a limitation to trustees and their heirs has been cut down to an estate *pur autre vie* (*Beaumont* v. *Salisbury* (*Marquis*) (1854), 19 Beav. 198; *Doe* v. *Hicks* (1797), 7 Term Rep. 433; *Curtis* v. *Price* (1805), 12 Ves. 89, p. 100). But, in general, legal limitations, and equitable limitations under an executed trust (*Re Whiston's Settlement*, *Lovatt* v. *Williamson*, [1894] 1 Ch. 661), are left to their strict effect. Compare *Re Ethel and Mitchells and Butler's Contract*, [1901] 1 Ch. 945 (p. 456, note (*b*), *post*). In a will greater latitude is allowed, the testator being assumed to have been *inops consilii* (*Lewis* v. *Rees* (1856), 3 K. & J. 132; *Colmore* v. *Tyndall* (1828), 2 Y. & J. 605, 622).

(*h*) *Shore* v. *Wilson*, *supra*, *per* PARKE, B., at p. 555; see *Barksdale* v. *Morgan* (1693), 4 Mod. Rep. 185, at p. 186.

to language, it must be a well-known peculiar idiomatic meaning in the particular country in which the person using the word was dwelling, or in the particular society of which he formed a member (*i*).

Exclusion of primary meaning by :—

**774.** The ordinary meaning or technical meaning of the words of an instrument may also be excluded, and a special meaning substituted, where this is necessitated by the subject-matter or context of the instrument (*k*), or by the external circumstances at the date of the instrument in regard to which it was to operate (*l*). Thus, as to subject-matter, an instrument dealing with mercantile matters is construed in accordance with the meaning placed on its words by persons conversant with the business to which it relates (*m*). As to the context, this may show that a particular word is used in a special sense—for instance, that "month," which *primâ facie* is to be taken in its technical legal sense of lunar month, is used in the sense of calendar month (*n*). And a similar effect may be produced

Subject-matter;

context;

(*i*) *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L., *per* TINDAL, C.J., at p. 567. See also *per* FARWELL, L.J., in *Rosin and Turpentine Import Co., Ltd.* v. *B. Jacob & Sons, Ltd.* (1909), 101 L. T. 56, C. A., at p. 59.

(*k*) See *Doe* v. *Burt* (1787), 1 Term Rep. 701, 703. An instrument, whatever its nature, "is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some special and peculiar sense" (*Robertson* v. *French* (1803), 4 East, 130, *per* Lord ELLENBOROUGH, C.J., at p. 135; quoted by ERLE, C.J., in *Carr* v. *Montefiore* (1864), 5 B. & S. 408, 428, Ex. Ch.; by BOWEN, L.J., in *Hart* v. *Standard Marine Insurance Co.* (1889), 22 Q. B. D. 499, 501, C. A.; by Lord HALSBURY, L.C., in *Glynn* v. *Margetson & Co.*, [1893] A. C. 351, 357; compare *Mallan* v. *May* (1844), 13 M. & W. 511, *per* POLLOCK, C.B., at p. 517; *Bruner* v. *Moore*, [1904] 1 Ch. 305, *per* FARWELL, J., at p. 310). Reference may also be made to *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1909] 1 Ch. 37, C. A.

(*l*) The primary meaning must be taken "if that meaning is not excluded by the context, and is sensible with reference to the extrinsic circumstances in which the writer was placed at the time of writing. By 'sensible with reference to the extrinsic circumstances' is not meant that the extrinsic circumstances make it more or less reasonable or probable that the primary meaning is what the writer should have intended; it is enough if these circumstances do not exclude it, that is, deprive the words of all reasonable application according to such primary meaning" (*Shore* v. *Wilson*, *supra*, *per* COLERIDGE, J., at p. 525; see *Smith* v. *Doe* d. *Jersey* (1821), 2 Brod. & Bing. 473, H. L., at pp. 550, 602).

(*m*) In effect this is the same as the rule in paragraph 773, *ante*, but the fact of the instrument being a mercantile instrument shows at once that the special sense is to be taken, if any such has been affixed to the terms by mercantile usage (p. 450, *post*).

(*n*) *Lang* v. *Gale* (1813), 1 M. & S. 111; *R.* v. *Chawton* (*Inhabitants*) (1841), 1 Q. B. 247; see *Simpson* v. *Margitson* (1847), 11 Q. B. 23; *Bruner* v. *Moore*, *supra*. As to extending "children" on the context to illegitimate children, see *Hill* v. *Crook* (1873), L. R. 6 H. L. 265, *per* Lord CAIRNS, at p. 283; *Monypenny* v. *Monypenny* (1858), 4 K. & J. 174, 182. As to "family," see *Re Terry's Will* (1854), 19 Beav. 580; *Pigg* v. *Clarke* (1876), 3 Ch. D. 672. As to restricting "minerals" by the context, see *Hext* v. *Gill* (1872), 7 Ch. App. 699, 712; *Tucker* v. *Linger* (1882), 21 Ch. D. 18, 36, C. A. As to "appertaining" to a messuage being construed in its popular sense of "usually occupied with," and not in

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external circumstances.

by the external circumstances, so that if the words, taken in the ordinary or technical sense, have no reasonable application in relation to such circumstances, another sense may be substituted. Thus, "children," which is treated in instruments disposing of property as a technical legal term, meaning legitimate children, will be construed to mean illegitimate children if there are no legitimate children to whom it could apply (*o*). And generally, if the surrounding circumstances, at the date of the instrument, show that the parties intended to use a word, not in its primary or strict sense, but in some secondary meaning, the judge may construe it from such circumstances, according to the intention of the parties (*p*).

Instrument must be construed as a whole.

**775.** It is a rule of construction applicable to all written instruments (*q*) that the instrument must be construed as a whole in order to ascertain the true meaning of its several clauses (*r*), and the words of each clause must be so interpreted as to bring them into harmony with the other provisions of the instrument, if that interpretation does no violence to the meaning of which they are naturally susceptible (*s*). The best construction of deeds is to make one part of the deed expound the other, and so to make all the

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its strict legal sense, see *Hill* v. *Grange* (1556), 1 Plowd. 168, 170. And generally as to modifying the language so as to carry out the general intention appearing from the instrument, see *St. John's, Hampstead* (*Vestry*) v. *Cotton* (1886), 12 App. Cas. 1, *per* Lord HALSBURY, L.C., at p. 6. A special meaning *primâ facie* assigned to a word is also capable of being varied by the context or external circumstances; but this is unlikely to occur.

(*o*) *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L., *per* ERSKINE, J., at p. 513; *Hill* v. *Crook* (1873), L. R. 6 H. L. 265, 282.

(*p*) *Simpson* v. *Margitson* (1847), 11 Q. B. 23, 31. Thus the surrounding circumstances may show that "your having this day advanced" in a deed does not mean that the advance was prior to the execution of the deed (*Goldshede* v. *Swan* (1847), 1 Exch. 154). A direction to the sheriff to withdraw from possession of goods, "the goods having been claimed," has been held to be confined to part of the goods, on evidence that only that part had been claimed (*Walker* v. *Hunter* (1845), 2 C. B. 324; see *Beckford* v. *Crutwell* (1832), 1 Mood. & R. 187, as to "London"; and compare *Mallan* v. *May* (1844), 13 M. & W. 511, on the same word). As to the ordinary meaning of "heretofore" being excluded, see *Roe* v. *Siddons* (1888), 22 Q. B. D. 224, C. A.

(*q*) *Crumpe* v. *Crumpe*, [1900] A. C. 127, *per* Lord HALSBURY, L.C., at p. 131; *Re Jodrell, Jodrell* v. *Seale* (1890), 44 Ch. D. 590, C. A., *per* Lord HALSBURY, L.C., at p. 605.

(*r*) "The construction must be on the entire deed" (Shep. Touch. 87; *Throckmerton* v. *Tracy* (1555), 1 Plowd. 145, 161; see *Shore* v. *Wilson* *supra*, *per* ERSKINE, J., at p. 511). "To pronounce on the meaning of a detached part or extract from an instrument, if relating to the same subject, is contrary to every principle of correct interpretation" (*Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1821), 2 Jac. & W. 1, *per* PLUMER, M.R., at p. 89; see *Hume* v. *Rundell* (1824), 2 Sim. & St. 174, *per* LEACH, V.-C., at p. 177).

(*s*) *North Eastern Rail.* v. *Hastings* (*Lord*), [1900] A. C., 260, *per* Lord DAVEY, at p. 267. "The sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done" (*Barton* v. *Fitzgerald* (1812), 15 East, 530, *per* Lord ELLENBOROUGH, C.J., at p. 541); *Sicklemore* v. *Thistleton* (1817), 6 M. & S. 9, *per* Lord ELLENBOROUGH, C.J., at p. 12; compare *Shelley's Case* (1581), 1 Co. Rep. 93 b, 95 b.

parts agree (*t*). And effect must, as far as possible, be given to every word and every clause (*a*).

Several instruments.

**776.** When a single transaction is carried into effect by several instruments, the whole are treated as one instrument, and, in pursuance of the preceding rule, they must all be read together for the purpose of ascertaining the intention of the parties; and this is so whether the instruments are actually contemporaneous—that is, all executed at the same time—or are executed within so short an interval that the court comes to the conclusion that they in fact represent a single transaction (*b*). Where one instrument alone is not effectual to accomplish the object contemplated—such as the execution of a power—it may be supplemented by another instrument (*c*); provided the two instruments are intended to operate together (*d*). Where the instruments are executed on the same occasion the exact order of execution is immaterial; for, whatever the fact may be, the court will treat that deed as executed first which will give effect to the intention of the parties (*e*).

If possible, the instrument must have effect.

**777.** If the intention of the parties can be ascertained from the written instrument, the court will give effect to that intention notwithstanding ambiguities in the words used or defects in the operation of the instrument. This is expressed by the maxim *Ut res magis valeat quam pereat* (*f*), or the English paraphrase: "A deed shall never be void where the words may be applied to any

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(*t*) *Nokes's Case* (1599), 4 Co. Rep. 81 a. "An instrument must not be construed in such a way that one part will contradict another part" (*Re Bedson's Trusts* (1885), 28 Ch. D. 523, C. A., *per* BRETT, M.R., at p. 525).

(*a*) See *Shelley's Case* (1581), 1 Co. Rep. 93 b, at p. 95 b; *Butler* v. *Duncombe* (1719), 1 P. Wms. 448, *per* PARKER, L.C., at p. 457. "It is a rule both in law and equity so to construe the whole deed or will, as that every clause should have its effect."

(*b*) *Smith* v. *Chadwick* (1882), 20 Ch. D. 27, C. A., *per* JESSEL, M.R. at p. 62; see *Harman* v. *Richards* (1852), 10 Hare, 81; *Hopgood* v. *Ernest* (1865), 3 De G. J. & Sm. 116. This case frequently occurred under the old law where conveyancing transactions were carried out by agreements followed by fine or recovery, see *Cromwel's* (*Lord*) *Case* (1601), 2 Co. Rep. 69 b, 76 a; *Havergil* v. *Hare* (1616), 3 Bulst. 250, 256; *Ferrers* v. *Fermor* (1622), Cro. Jac. 643, where a bargain and sale, fine and recovery, were treated as one assurance, so that a term which was merged by the bargain and sale and fine, in consequence of the conveyance thereby effected being to the lessee, was revived upon the lessee suffering a recovery to the use of a third person; compare *Selwyn* v. *Selwyn* (1761), 2 Burr. 1131, 1134; *Bolton* (*Duke*) v. *Williams* (1793), 2 Ves. 138, where all the instruments securing an annuity were held to make but one assurance, and *Harrison* v. *Mexican Rail. Co.* (1875), L. R. 19 Eq. 358.

(*c*) *Leicester's* (*Earl*) *Case* (1676), 1 Vent. 278. The rule is expressed by the maxim *Quæ non valent singula, juncta prosunt.*

(*d* *Hawkins* v. *Kemp* (1803), 3 East, 410.

(*e*) *Gartside* v. *Silkstone and Dodworth Coal and Iron Co.* (1882), 21 Ch. D. 762, *per* FRY, J., at p. 767; *Taylor* v. *Horde* (1755), 1 Burr. 59, *per* Lord MANSFIELD, C.J., at p. 106; 2 Smith, L. C., 11th ed., pp. 575, 593, 625.

(*f*) "A rule of common law and common sense" (*Langston* v. *Langston* (1834), 2 Cl. & Fin. 194, H. L., *per* Lord BROUGHAM, L.C., at p. 243). "And yet no well advised man will trust to such deeds, which the law by construction maketh good, *ut res magis valeat*; but when form and substance concur, then is the deed fair and absolutely good" (Co. Litt. 7 a).

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intent to make it good" (*g*). Hence, where the words are capable of a twofold construction, such construction is to be adopted as tends to uphold the deed (*h*); and where the deed is incapable of operating in the mode expressed, it will, if possible, be allowed to operate in some other way having a similar result (*i*). A deed intended to take effect as a grant will operate as such, although it does not contain appropriate words of conveyance (*k*).

Construction against grantor or covenantor.

**778.** If a doubt arises upon the construction of a grant, and the doubt can be removed by construing the deed adversely to the grantor, this will be done (*l*). The words of a deed, executed for valuable consideration, are to be construed, as far as they

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(*g*) *Throckmerton* v. *Tracy* (1555), 1 Plowd. 145, 160. "Such a construction ought to be made of deeds that the end and design of deeds should take effect rather than the contrary" (*Smith* v. *Packhurst* (1742), 3 Atk. 135, *per* WILLES, C.J., at p. 136); see also *per* FARWELL, L.J., in *Rosin and Turpentine Import Co., Ltd.* v. *B. Jacob & Sons, Ltd.* (1909), 101 L. T. 56, C. A., and *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1909] 1 Ch. 37, C. A.

(*h*) *Atkinson* v. *Hutchinson* (1734), 3 P. Wms. 258, *per* TALBOT, L.C., at p. 260; quoted in *Thellusson* v. *Woodford* (1799), 4 Ves., 227, 312; *Solly* v. *Forbes* (1820), 4 Moore (C. P.), 448, 463.

(*i*) "Deeds shall operate according to the intention of the parties, if by law they may; and if they cannot operate in one form they shall operate in that which by law will effect the intention" (*Goodtitle* v. *Bailey* (1777), 2 Cowp. 597, *per* Lord MANSFIELD, C.J., p. 600). "A deed that is intended and made to one purpose may enure to another, for if it will not take effect in that way it is intended, it may take effect another way, provided it may have that effect consistently with the intention of the parties" (Shep. Touch. 82).

Recourse was frequently had to this rule under the old law with its diverse and highly technical forms of conveyancing; and a conveyance which was void in its primary form was allowed to take effect, if possible, in some other manner. Thus where a grant, or a release following upon a lease, was void as an attempt to create an estate of freehold *in futuro* (*Doe* d. *Wilkinson* v. *Tranmarr* (1758), Willes, 682; *Doe* d. *Starling* v. *Prince* (1851), 20 L. J. (C. P.) 223), or where a bargain and sale, though duly enrolled, was void for want of a pecuniary consideration (*Crossing* v. *Scudamore* (1671), 1 Vent. 137; *Doe* d. *Milburn* v. *Salkeld* (1755), Willes, 673), in any such case, if the conveyance was in favour of a relation by blood or marriage, it might operate as a covenant to stand seised; see notes to *Chester* v. *Willan* (1670), 2 Wms. Saund. 96; *Marshall* v. *Frank* (1717), Prec. Ch. 480. And although the conveyance was to trustees, yet the relationship of the beneficiary to the settlor was sufficient to raise the necessary consideration for a covenant to stand seised (*Doe* d. *Lewis* v. *Davies* (1837), 2 M. & W. 503).

(*k*) *Shove* v. *Pincke* (1793), 5 Term Rep. 124; *Haggerston* v. *Hanbury* (1826), 5 B. & C. 101; *Doe* d. *Were* v. *Cole* (1827), 7 B. & C. 243; *Doe* d. *Jones* v. *Williams* (1833), 5 B. & Ad. 783. So the words "limit and appoint" may operate as a grant (*MacAndrew* v. *Gallagher* (1874), 8 I. R. Eq. 490). As to deeds which operate as leases, see title LANDLORD AND TENANT. As to deeds operating as execution or release of powers, see title POWERS. As to voluntary settlements, see title FRAUDULENT AND VOIDABLE CONVEYANCES.

(*l*) "It is a maxim of the law that every man's grant shall be taken most strongly against himself" (Co. Litt. 183 a; see 264 b). "All the words of a deed shall be taken most strongly against him that doth speak them, and most in advantage of the other party" (Shep. Touch. 87); *Throckmerton* v. *Tracy*, *supra*; *Doe* d. *Davies* v. *Williams* (1788), 1 Hy. Bl. 25). See also *Gluckstein* v. *Barnes*, [1900] A. C. 240, *per* Lord MACNAGHTEN, at p. 250. The rule operates in favour of a lessee (*Windham's* (*Justice*) *Case* (1589), 5 Co. Rep. 7 b; *Seaman's Case* (1610), Godb. 166; *Manchester College* v. *Trafford* (1679), 2 Show. 31; *Dann* v. *Spurrier* (1803), 3 Bos. & P. 399, 403; *Doe* d. *Webb* v. *Dixon* (1807), 9 East, 15, 16).

properly may, in favour of the grantee (*m*). And where there is a grant and an exception out of it, the exception is taken as inserted for the benefit of the grantor, and is construed in favour of the grantee (*n*). A settlement in which the same person is at once grantor and grantee is construed as if made by a stranger (*o*). Similarly, covenants are construed most strongly against the covenantor, and most beneficially in favour of the covenantee (*p*).

Generally an instrument must be read most strongly against the party who prepares it and offers it for execution by the other—such as a declaration prepared by an insurance company for signature by an intending insurer (*q*).

But the rule—which is expressed in the maxim *Verba fortius accipiuntur contra proferentem*—is subject to the general principle that the instrument must be construed in accordance with the expressed intention (*r*); and it does not come into operation until a doubt arises upon the construction of the instrument (*s*); nor is it applied when the effect would be to make the grantor's deed work a wrong (*t*). Moreover, it is to be applied only when all other rules of construction fail (*a*).

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(*m*) *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135, *per* Lord SELBORNE, L.C., at p. 149; Co. Litt. 183 a; *Willion* v. *Berkley* (1562), 1 Plowd. 223, 243; *Windham's* (*Justice*) *Case* (1589), 5 Co. Rep. 7 b; *Davenport's Case* (1610), 8 Co. Rep. 144 b; *Re Stroud* (1849), 8 C. B. 502, *per* WILDE, C.J., at p. 529; *Johnson* v. *Edgware etc. Rail. Co.* (1866), 35 Beav. 480, *per* Lord ROMILLY, M.R., at p. 484.

(*n*) *Savill Brothers, Ltd.* v. *Bethell*, [1902] 2 Ch. 523, 537, C. A.; Shep. Touch. 100; *Cardigan* (*Earl*) v. *Armitage* (1823), 2 B. & C. 197, 207; *Bullen* v. *Denning* (1826), 5 B. & C. 842, 847, 850.

(*o*) *Vincent* v. *Spicer* (1856), 22 Beav. 380, 383.

(*p*) *Warde* v. *Warde* (1852), 16 Beav. 103, *per* ROMILLY, M.R., at p. 105; *e.g.*, covenants for title (*Barton* v. *Fitzgerald* (1812), 15 East, 530, *per* BAYLEY, J., at p. 546), or covenants in a lease (*Webb* v. *Plummer* (1819), 2 B. & Ald. 746, 751; *Doe* d. *Abdy* (*Sir W.*) v. *Stevens* (1832), 3 B. & Ad. 299, 303; *Barrett* v. *Bedford* (*Duke*) (1800), 8 Term Rep. 602, 605).

(*q*) *Fowkes* v. *Manchester and London Assurance Association* (1863), 3 B. & S. 917, *per* COCKBURN, C.J., at p. 925. As to exceptions in a bill of lading, see *Taylor* v. *Liverpool and Great Western Steam Co.* (1874), L. R. 9 Q. B. 546, *per* LUSH, J., at p. 549; compare *Birrell* v. *Dryer* (1884), 9 App. Cas. 345.

(*r*) See *Webb* v. *Plummer* (1819), 2 B. & Ald. 746, *per* HOLROYD, J., at p. 751.

(*s*) See *Rubery* v. *Jervoise* (1786), 1 Term Rep. 229, *per* WILLES, J., at p. 234; *Fowle* v. *Welsh* (1822), 1 B. & C. 29, *per* BAYLEY, J., at p. 35. "The rule that, if the words are doubtful, the construction must be most strong against the covenantor is qualified by the rule that effect must be given to every word, and if when this is done the doubt is removed, there is no room for the former rule" (*Patching* v. *Dubbins* (1853), Kay, 1, *per* WOOD, V.-C., at pp. 13, 14).

(*t*) "It is a general rule that, whensoever the words of a deed, or of the parties without a deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken" (Co. Litt. 42 a; Shep. Touch. 88). And this rule is superior to the rule that the deed shall be construed most strongly against the grantor (*Rodger* v. *Comptoir d'Escompte de Paris* (1869), L. R. 2 P. C. 393, 406 (disapproved on another ground in *Leask* v. *Scott* (1877), 2 Q. B. D. 376)).

(*a*) *Lindus* v. *Melrose* (1858), 3 H. & N. 177, Ex. Ch., *per* COLERIDGE, J., at p. 182; and see *Burton* v. *English* (1883), 12 Q. B. D. 218, C. A., *per* BRETT, M.R., at p. 220. It was suggested by JESSEL, M.R., in *Taylor* v. *St. Helens Corporation* (1877), 6 Ch. D. 264, at p. 270, that, having regard to the rule of construction established in *Grey* v. *Pearson* (1857), 6 H. L. Cas. 61, 106

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In the case of a grant by the Crown the rule is reversed, and the grant is taken most strongly against the grantee and in favour of the Crown (*b*), unless the grant is expressed to be made "of special grace, mere motion, and certain knowledge" (*c*).

*Expressum facit cessare tacitum.*

**779.** An express provision in an instrument excludes any stipulation which would otherwise be implied with regard to the same subject-matter. The rule is expressed in the maxim *Expressum facit cessare tacitum* (*d*), and is based upon the presumption that the parties, having expressed some, have expressed all the conditions by which they intend to be bound under the instrument in respect of the particular subject-matter (*e*).

Specific powers exclude general powers.

**780.** Upon a similar principle is based the maxim *Expressio unius est exclusio alterius* (*f*). Where an instrument authorises a particular mode of selling or otherwise dealing with property, this excludes any other mode of dealing with it for the same purpose (*g*). And generally, where authority to do an act is given upon a defined condition, the expression of that condition excludes the doing of the act under other circumstances than those so defined (*h*).

But the maxim requires to be applied with caution. The failure

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(see p. 435, *ante*), there was no longer any room for the rule that a deed must be construed most strongly against the grantor; the meaning of the instrument was to be discovered by the ordinary rules, and if the ordinary rules failed to discover the meaning, then the instrument would be void for uncertainty. But, in fact, the rule is intended to remove the uncertainty and establish the deed, and it does not seem to have been affected by this criticism. In accordance with the rule stated above, the words of an indenture are construed most strongly against the party who is to be regarded as using them; see the argument in *Browning* v. *Beston* (1555), 1 Plowd. 131, 134.

(*b*) *Willion* v. *Berkley* (1562), 1 Plowd. 223, 243. But the maxim does not override the ordinary rules for ascertaining what is included in the grant (*A.-G.* v. *Ewelme Hospital* (1853), 17 Beav. 366, 386; *Lord* v. *Sydney Commissioners* (1859), 12 Moo. P. C. C. 473, at p. 497). As to Crown grants generally, see *Alton Wood's Case* (1600), 1 Co. Rep. 40 b.

(*c*) *Alton Wood's Case, supra;* Com. Dig. Grant, G. 12; Vin. Abr. Prerog. E. c. 3; *Doe* d. *Devine* v. *Wilson* (1855), 10 Moo. P. C. C. 502, at p. 525; *contra*, *R.* v. *Capper* (1817), 5 Price, 217, at p. 260.

(*d*) See Co. Litt. 183 b, 210 a.

(*e*) *Aspdin* v. *Austin* (1844), 5 Q. B. 671, *per* Lord DENMAN, C.J., at p. 684; see *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256, 265. Thus, upon an advance on mortgage, if the mortgage deed contains no covenant for payment, a personal obligation to repay the money is implied; but if the deed contains a covenant for payment out of particular funds, the implication of a personal contract is excluded (*Mathew* v. *Blackmore* (1857), 1 H. & N. 762, 771, 772). Similarly, upon a letting, an express covenant for quiet enjoyment excludes the covenant which would be implied from the use of the word "demise," or, without such word, from the mere letting (*Line* v. *Stephenson* (1838), 5 Bing. (N. C.) 183, Ex. Ch.; *Nokes's Case* (1599), 4 Co. Rep. 81 a; *Merrill* v. *Frame* (1812), 4 Taunt. 329; see *Markham* v. *Paget*, [1908] 1 Ch. 697). As to an express grant of appurtenances, see *Birmingham, Dudley and District Banking Co.* v. *Ross* (1888), 38 Ch. D. 296, 308, C. A.

(*f*) See Co. Litt. 210 a.

(*g*) *Blackburn* v. *Flavelle* (1881), 6 App. Cas. 628, 634, P. C. So in a conveyance of two distinct buildings, the express mention of the fixtures in one of them has been held to exclude those in the other (*Hare* v. *Horton* (1833), 5 B. & Ad. 715; see p. 729).

(*h*) *North Stafford Steel etc. Co.* v. *Ward* (1868), L. R. 3 Exch. 172, Ex. Ch., *per* WILLES, J., at p. 177.

to make the *expressio* complete may be accidental (*i*); and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, will lead to inconsistency or injustice (*k*). It should only be applied when the instrument, on the face of it, apparently contains all the terms which the parties have agreed upon (*l*).

Expression of implied terms has no effect.

**781.** The expression of a clause which the law implies as the necessary consequence of the contract between the parties has no legal operation. *Expressio eorum quæ tacite insunt nihil operatur* (*m*). It merely serves to remove any doubt which might arise in the mind of a person unacquainted with the law (*n*). Consequently the express clause does not vary the legal effect of the implied clause (*o*), nor does it necessitate any additional stamp duty (*p*). And where a grant of property confers by implication powers which are essential to its enjoyment, these are not cut down by the express conferment in positive terms of restricted powers to the same effect (*q*). But, save in this case, an express clause which varies from the implied clause excludes it in accordance with the rule stated in the preceding paragraph.

The present rule only deprives the words needlessly introduced of effect upon their own clause. Though they are superfluous for

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(*i*) *Colquhoun* v. *Brooks* (1887), 19 Q. B. D. 400, *per* WILLS, J., at p. 406, suggesting that the omission may arise from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention.

(*k*) *Colquhoun* v. *Brooks* (1888), 21 Q. B. D. 52, C. A., *per* LOPES, L.J., at p. 65; *Lowe* v. *Dorling & Son*, [1906] 2 K. B., *per* FARWELL, L.J., at p. 785.

(*l*) *Devonald* v. *Rosser & Sons*, [1906] 2 K. B. 728, C. A., *per* FARWELL, L.J., at p. 745.

(*m*) *Borough's Case* (1596), 4 Co. Rep. 72 b; Co. Litt. 205 a; see 224 b. Thus a reservation of rent to a lessor for his life is not varied by the addition of the words "and his assigns," which are implied (*Sury* v. *Cole* (or *Brown*) (1625), Lat. 44, 255; see *Wotton and Edwin's Case* (1607), 12 Co. Rep. 36).

(*n*) It is useful "to express and declare to laymen which have no knowledge of the law what the law requires in such cases" (4 Co. Rep. 73 b; see Littleton's Tenures, s. 331).

(*o*) *E.g.*, an express power of distress, provided its terms do not impose requirements other than those of a common law power of distress (*Browne* v. *Dunnery* (1617), Hob. 208); compare *Doe* d. *Scholefield* v. *Alexander* (1814), 2 M. & S. 525, 532, where, in a proviso for re-entry on default in payment of rent "being lawfully demanded," the introduction of these words added nothing to the clause. And compare the cases cited in note (*e*), on p. 442, *ante*.

(*p*) Thus, where a mortgage deed expressly secures expenses incurred by the mortgagee which he would be allowed, in the absence of express provision, to add to his security, the present maxim renders it unnecessary to increase the stamp so as to cover these expenses (*Doe* d. *Scruton* v. *Snaith* (1832), 8 Bing. 146, 154; *Doe* d. *Merceron* v. *Bragg* (1838), 8 Ad. & El. 620 (rates and taxes); *Wroughton* v. *Turtle* (1843), 11 M. & W. 561, 570 (fines for renewal); *Frith* v. *Rotherham* (1846), 15 L. J. (EX.) 133 (bankers' commission); *Lawrance* v. *Boston* (1851), 7 Exch. 28 (premiums on policy of insurance)).

(*q*) Thus, upon an absolute grant of trees, an express power to cut and carry them away during five years does not restrict the implied power to cut and carry them away at any time (*Stukeley* v. *Butler* (1615), Hob. 168; see Dyer 19 b, pl. 115 (1536)). And where, in a grant of land, there is an exception of minerals to the grantor, his heirs, and assigns, an express liberty for the grantor and his heirs to get them does not restrict the general right for the assigns to do so which is implied from the exception in their favour (*Cardigan (Earl)* v. *Armitage* (1823), 2 B. & C. 197; see also *Hodgson* v. *Field* (1806), 7 East, 613).

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the immediate purpose of that clause, they may affect the construction of other clauses in the instrument (*r*).

## SECT. 2. — *Admission of Extrinsic Evidence.*

### SUB-SECT. 1.—*To vary or add to the Document.*

#### (1) *General Rule.*

Extrinsic evidence to vary instrument.

**782.** The language of the written document, whether a contract or conveyance, is the final expression of the intention of the parties; and, in general, it is not permissible to adduce extrinsic evidence, either to show such intention (*s*), or to contradict, vary, or add to the terms of the document (*t*). Consequently the construction cannot be controlled by previous negotiations (*a*); and when a written agreement is carried into effect by a conveyance, the conveyance becomes the final evidence of the intention of the parties, and is not liable to be varied by reference to the agreement (*b*); nor is the construction of a written instrument varied by

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(*r*) "The rule *expressio eorum* etc., is to be understood having respect to itself only, and not having relation to other clauses. Thus, a grant of land carries the underwoods, and a grant of a house carries the shops in it; but the mention of underwoods or shops will save them from being excluded by a subsequent exception" (*Stukeley* v. *Butler* (1615), Hob. 168, p. 170).

(*s*) "No extrinsic evidence of the intention of the party to the deed from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to have been written" (*Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L., *per* PARKE, B., at p. 556; *per* TINDAL, C.J., at pp. 565-567; *Bradford (Earl)* v. *Romney* (1862), 30 Beav. 431, p. 436). But evidence of intention is admissible in a suit to rectify a deed on the ground of common error (S. C. 438). See also title CONTRACT, Vol. VII., p. 523.

(*t*) "I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to contradict, vary, or add to the words of a deed" (*Smith* v. *Doe* d. *Jersey (Earl)* (1821), 2 Brod. & Bing. 473, H. L., *per* PARK, J., at p. 541). "If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract (*Goss* v. *Nugent (Lord)* (1833), 5 B. & Ad. 58, *per* Lord DENMAN, C.J., at p. 64). The principle enunciated in these *dicta* has been recognised from early times (*Rutland's (Countess) Case* (1604), 5 Co. Rep. 25 b, 26 a; *Haynes* v. *Hare* (1791), 1 Hy. Bl. 659, 664; *Preston* v. *Mercerau* (1779), 2 Wm. Bl. 1249; *Irnham* v. *Child* (1781), 1 Bro. C. C. 92; *Henson* v. *Coope* (1841), 3 Scott (N. R.), 48; *Cromwel's (Lord) Case* (1601), 2 Co. Rep. 69 b, 76 a, note (G, 1)).

(*a*) "The law is that whatever the negotiations may be that precede the purchase, still the parties to the conveyance are bound by it" (*Prison Commissioners* v. *Middlesex (Clerk of the Peace)* (1882), 9 Q. B. D. 506, C. A., *per* JESSEL, M.R., at p. 511). Drafts cannot be looked at (*National Bank of Australasia* v. *Falkingham & Sons*, [1902] A. C. 585, P. C., at p. 591).

(*b*) Where an executory contract has been carried out by deed, the contract is merged in the deed, so far as the deed covers the subject-matter of the contract, and it cannot be used to vary the deed; see *Leggott* v. *Barrett* (1880), 15 Ch. D. 306, C. A., *per* JAMES, L.J., at p. 309: "You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself"; *Williams* v. *Morgan* (1850), 15 Q. B. 782; *Teebay* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1883), 24 Ch. D. 572; *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351, 359, C. A.;

the subsequent declaration (*c*) or conduct (*d*) of the parties. The instrument is to be construed as at the time of its execution (*e*).

But while this is the rule in all ordinary proceedings taken upon the written agreement, it is not enforced when the court is asked to grant the discretionary remedy of specific performance, and then the defendant is allowed to give parol evidence to show that the written instrument does not represent the real contract between the parties (*f*).

And the rule is strictly applied only when the language of the instrument is clear (*g*); if the construction is doubtful, and the doubt cannot be removed in any other way, it is permissible to refer to a preliminary agreement, at any rate if recited in the instrument (*h*), or to acts done in pursuance of the instrument (*i*), though not to mere subsequent declarations.

(2) *Date and Consideration.*

Parol evidence admissible to prove date of execution.

**783.** Parol evidence is admissible to prove the date of delivery of a deed, or of the execution of any other written instrument. A deed takes effect from delivery, and any other written instrument from the date of execution, and though the date expressed in the instrument is *primâ facie* to be taken as the date of delivery or execution (*k*), yet this does not exclude extrinsic evidence of the actual date; and the actual date, when proved, prevails, in case of

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compare *Greswolde-Williams* v. *Barneby* (1900), 49 W. R. 203; and see *Salaman* v. *Glover* (1875), L. R. 20 Eq. 444, where, upon a lease being granted pursuant to an agreement, and in accordance with a scheduled form, a proviso in the agreement excluding certain rights of light and air was read as if inserted in the lease. Similarly, conditions of sale cannot control the construction of the conveyance (*Doe* d. *Norton* v. *Webster* (1840), 12 Ad. & El. 442).

(*c*) "It is always legitimate to look at all the co-existing circumstances, in order to apply the language and so to construe the contract; but subsequent declarations, showing what the party supposed to be the effect of the contract, are not admissible to construe it" (*Lewis* v. *Nicholson* (1852), 18 Q. B. 503, *per* Lord CAMPBELL, C.J., p. 510; see *Doe* d. *Norton* v. *Webster*, *supra*; *Bruner* v. *Moore*, [1904] 1 Ch. 305, *per* FARWELL, J., at p. 310).

(*d*) "No point of law can, I apprehend, be better settled than this: that, in construing the agreement, no acts of the parties subsequent to the making of it are, as such, admissible for the purpose of determining its meaning" (*Monro* v. *Taylor* (1850), 8 Hare, 51, *per* WIGRAM, V.-C., at p. 56; *Bruner* v. *Moore*, *supra*); that is, if the words are plain and unambiguous (*North Eastern Rail. Co.* v. *Hastings* (*Lord*), [1900] A. C. 260, *per* Lord HALSBURY, L.C., at p. 263). Compare the different rule where the terms of the instrument are doubtful, see p. 451, *post*.

(*e*) *Balfour* v. *Welland* (1809), 16 Ves. 151, 156; *Hastings* (*Lord*) v. *North Eastern Rail. Co.*, [1899] 1 Ch. 656, 664, C. A.

(*f*) *Rich* v. *Jackson* (1794), 4 Bro. C. C. 514; see 6 Ves. 334, n.; *Woollam* v. *Hearn* (1802), 7 Ves. 211, 218, 219; *Martin* v. *Pycroft* (1852), 2 De G. M. & G. 785, 795, C. A.; compare *Omerod* v. *Hardman* (1801), 5 Ves. 722, 730.

(*g*) See *Clifton* v. *Walmesley* (1794), 5 Term Rep. 564.

(*h*) *Leggott* v. *Barrett* (1880), 15 Ch. D. 306, C. A., *per* JAMES, L.J., at p. 309: "You have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself."

(*i*) See p. 451, *post*.

(*k*) *Malpas* v. *Clements* (1850), 19 L. J. (Q. B.) 435; *Morgan* v. *Whitmore* (1851), 6 Exch. 716, 719; see p. 382, *ante*.

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variance, over the apparent date (*l*). But a reference in the deed to its date—*e.g.*, a covenant to do a thing within a specified time after the date of the deed—is construed as referring to the date expressed in the deed; unless there is no date so expressed, or an impossible date, and then the reference is taken to be to the date of delivery (*m*).

Parol evidence to prove consideration.

**784.** Where no consideration (*n*), or a nominal consideration (*o*), is expressed in the instrument, or the consideration is stated generally — *e.g.*, for divers good considerations (*p*) — extrinsic evidence is admissible to prove the real consideration; and where a substantial consideration is expressed in the instrument, extrinsic evidence is admissible to prove an additional consideration, provided this is not inconsistent with the terms of the instrument (*q*). It is not in contradiction to the instrument to prove a larger consideration than that which is stated (*r*).

(3) *Custom.*

Evidence of custom.

**785.** Evidence of custom is admissible for the purpose of annexing incidents to written contracts in respect of matters upon which they are silent (*s*). The rule applies not only to commercial transactions, but also to other transactions relating to matters upon which known usages have been established; and it is founded upon the presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they

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(*l*) *Goddard's Case* (1584), 2 Co. Rep. 4 b; *Clayton's Case* (1585), 5 Co. Rep. 1 a; Shep. Touch. 72; *Steele* v. *Mart* (1825), 4 B. & C. 272. "The rule uniformly acted upon from the time of *Clayton's Case* to the present date is that a deed or other writing must be taken to speak from the time of the execution, and not from the date apparent on the face of the deed. That date, indeed, is to be taken *primâ facie* as the true time of execution; but as soon as the contrary appears, the apparent date is to be utterly disregarded (*Browne* v. *Burton* (1847), 5 Dow. & L. 289, *per* PATTESON, J., at p. 292; compare *Jayne* v. *Hughes* (1854), 10 Exch. 430, 433; *Reffell* v. *Reffell* (1866), L. R. 1 P. & D. 139, 142).

(*m*) Co. Litt. 46 b; *Styles* v. *Wardle* (1825), 4 B. & C. 908.

(*n*) Shep. Touch. 510; *Pott* v. *Todhunter* (1845), 2 Coll. 76, 84; *Townend* v. *Toker* (1866), 1 Ch. App. 446, 459; *Llanelly Railway and Dock Co.* v. *London and North Western Rail. Co.* (1873), 8 Ch. App. 942, 955.

(*o*) *Leifchild's Case* (1865), L. R. 1 Eq. 231.

(*p*) Shep. Touch. 510; *Mildmay's Case* (1584), 1 Co. Rep. 175 a, 176 a, b.

(*q*) *Villers* v. *Beaumont* (1557), 2 Dyer, 146 a; *Vernon's Case* (1572), 4 Co. Rep. 1a, 3 a; *Bedell's Case* (1607), 7 Co. Rep. 40 a; *R.* v. *Scammonden (Inhabitants)* (1789), 3 Term Rep. 474; *Nixon* v. *Hamilton* (1838), 2 Dr. & Wal. 364, 385; *Clifford* v. *Turrell* (1841), 1 Y. & C. Ch. Cas. 138, 149; on appeal (1845), 9 Jur. 633, *per* Lord LYNDHURST, L.C.: "The settled rule of law is that you may go out of the deed to prove a consideration that stands with that stated on the face of the deed, but you cannot be allowed to prove a consideration inconsistent with it"; *Frail* v. *Ellis* (1852), 16 Beav. 350; *Frith* v. *Frith*, [1906] A. C. 254, P. C. In *Peacock* v. *Monk* (1748), 1 Ves. Sen. 127, 128, Lord HARDWICKE, L.C., expressed the view that, unless the deed said "and for other considerations," a consideration in addition to that expressed would be contrary to the deed, and evidence of it could not be admitted; but this must be taken to be overruled (9 Jur. 633; see *Bayspoole* v. *Collins* (1871), 6 Ch. App. 228; *Stiles* v. *A.-G.* (1740), 2 Atk. 152).

(*r*) *Clifford* v. *Turrell*, *supra*.

(*s*) *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438, *per* COTTON, L.J., at p. 443. See title CUSTOM AND USAGES, p. 260, *ante*.

intended to be bound, but to contract with reference to those known usages . The custom, however, must not be repugnant to, or inconsistent with, the written contract (*b*), and it must be possible to attribute knowledge of the custom to the parties (*c*).

(4) *Collateral Parol Agreement.*

Evidence of collateral parol agreements.

**786.** Under certain conditions evidence may be given of a parol agreement contemporaneous with and touching the subject-matter of a written agreement. The necessary conditions are that the parol agreement shall be entirely collateral to the written agreement (*d*), and that it shall not contradict the written agreement (*e*). The parol agreement will be more readily enforced if it was an inducement to entering into the written agreement (*f*). The parol agreement, moreover, must not be such as is required by the Statute of Frauds or otherwise to be in writing (*g*).

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(*a*) *Hutton* v. *Warren* (1836), 1 M. & W. 466, *per* PARKE, B., at p. 475; *Gibson* v. *Small* (1853), 4 H. L. Cas. 353, 397; *Brown* v. *Byrne* (1851), 3 E. & B. 703, *per* COLERIDGE, J., at p. 715: "In all contracts as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify those known usages, which are included, however, as of course, by mutual understanding; evidence, therefore, of such incidents is receivable." And as to the expediency of allowing this addition to the written contract, see *Trueman* v. *Loder* (1840), 11 Ad. & El. 589, *per* Lord DENMAN, C.J., at p. 597; *Humfrey* v. *Dale* (1857), 7 E. & B. 266, *per* Lord CAMPBELL, C.J., at p. 278.

In *Spartali* v. *Benecke* (1850), 10 C. B. 212, it was pointed out by WILDE, C.J., at p. 222, that the effect of custom may be (1) to prove that words in the particular trade are used in a peculiar sense, different from the ordinary sense; and (2) to annex incidents to the contract in matters on which the contract is silent. In either case they do not vary or contradict, either expressly or by implication, the terms of the written instrument. The former use of custom will be noticed again subsequently, p. 450, *post*.

(*b*) *Brown* v. *Byrne*, *supra*, at p. 715; and the custom cannot override the legal effect of the actual document, so as, for instance, to vary the priority of incumbrances (*Menzies* v. *Lightfoot* (1871), L. R. 11 Eq. 459).

(*c*) As to the effect of custom and usage upon contracts, see title CUSTOM AND USAGES, p. 260, *ante*.

(*d*) The following agreements have been held to be collateral:—Parol agreement by a landlord to destroy rabbits made on the granting of a lease of grassland (*Morgan* v. *Griffith* (1871), L. R. 6 Exch. 70; *Erskine* v. *Adeane* (1873), 8 Ch. App. 756); a parol representation, amounting to a warranty, made upon letting a house, that the drains are in good order (*De Lassalle* v. *Guildford*, [1901] 2 K. B. 215, C. A.). A parol agreement to put the premises into repair has been held to be collateral (*Mann* v. *Nunn* (1874), 43 L. J. (C. P.) 241; but this case has been doubted (*Angell* v. *Duke* (1875), 32 L. T. 320)); and on an agreement to let a house and scheduled furniture a previous parol agreement to provide more furniture is not admissible (*Angell* v. *Duke*, *supra*; *Burtsal* v. *Bianchi* (1891), 65 L. T. 678; but in the case of *Angell* v. *Duke*, *supra*, at an earlier stage ((1875), L. R. 10 Q. B. 174), such an agreement was held to be collateral).

(*e*) *Morgan* v. *Griffith*, *supra*, at p. 73; *Erskine* v. *Adeane*, *supra*, at p. 766; *New London Credit Syndicate, Ltd.* v. *Neale*, [1898] 2 Q. B. 487. See, further, title BILLS OF EXCHANGE ETC., Vol. II., p. 483.

(*f*) *Morgan* v. *Griffith*, *supra*; *Erskine* v. *Adeane*, *supra*; compare *Seago* v. *Deane* (1828), 4 Bing. 459.

(*g*) If the contract is really collateral, it does not require to be in writing merely because the principal agreement, which is in writing, relates to an interest in land (*Angell* v. *Duke* (1875), L. R. 10 Q. B. 174, 178; *Boston* v. *Boston*, [1904] 1 K. B. 124, C. A.; compare *Mechelen* v. *Wallace* (1837), 7 Ad. & El. 49). Where the

SECT. 2. SUB-SECT. 2.—*To Explain the Meaning and Application of Words.*

**Admission of Extrinsic Evidence.**

Surrounding circumstances.

**787.** The object of interpretation is, as already stated, to ascertain the intention of the parties to the instrument as expressed by the words they have used; and, since the words are the sole guide to the intention (*h*), extrinsic evidence of that intention is not admissible, save in the case of a latent ambiguity which cannot otherwise be resolved (*i*).

But extrinsic evidence is admissible both to ascertain where necessary the meaning of the words used, and to identify the persons or objects to which they are to be applied (*k*); and, since the meaning and the application will depend upon the circumstances surrounding the author at the time when the words were used (*l*), the same principle requires that evidence of such circumstances should be admitted. The court, which has to construe the document, ought to know the surrounding circumstances at the time when it was executed (*m*), so as to place itself, as nearly as possible, in the position of the parties (*n*). The intention of the parties is expressed in the words, used as they were with regard to the particular circumstances and facts (*o*). Moreover, it may appear from the surrounding circumstances that a series of instruments, although not expressly

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collateral agreement is to be performed by the landlord during the whole currency of a lease exceeding one year, its immediate performance by the tenant in executing the lease is apparently sufficient to exempt it from the statutory requirement that contracts not to be performed within the year must be in writing (see argument in *Erskine* v. *Adeane* (1873), 8 Ch. App. 756, at p. 764).

(*h*) See p. 434, *ante*.

(*i*) See p. 454, *post*.

(*k*) Evidence, that is, to enable the court to discover the meaning of the terms of the written document, and to apply them to the facts (*Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L., *per* PARKE, B., at p. 555). By "meaning" is meant either the ordinary or some special meaning as defined in the succeeding paragraphs of the text; not the particular meaning, varying from such ordinary or special meaning, which the author of the document may have had in view. See note (*h*) on p. 450, *post*.

(*l*) *Shore* v. *Wilson*, *supra*, *per* Lord COTTENHAM, at p. 580.

(*m*) "In construing all instruments, you must know what the facts were when the agreement was entered into" (*Cannon* v. *Villars* (1878), 8 Ch. D. 415, *per* JESSEL, M.R., at p. 419; see *Shore* v. *Wilson*, *supra*, *per* ERSKINE, J., at p. 512; *Smith* v. *Doe* d. *Jersey* (*Earl*) (1821), 2 Brod. & Bing. 473, H. L., *per* BAYLEY, J., at p. 550; *Bradford* (*Earl*) v. *Romney* (1862), 30 Beav. 431, 436; *Sidebotham* v. *Knott* (1872), 20 W. R. 415).

(*n*) *Hart* v. *Hart* (1881), 18 Ch. D. 670, *per* KAY, J., at p. 693; and see *per* Lord WENSLEYDALE in *Shore* v. *Wilson*, *supra*, at p. 556; *Grey* v. *Pearson* (1857), 6 H. L. Cas. 61, 106; *Roddy* v. *Fitzgerald* (1858), 6 H. L. Cas. 823, 876; *Baird* v. *Fortune* (1861), 4 Macq. 127, 149, H. L.; *per* SUGDEN, L.C., in *A.-G.* v. *Drummond* (1842), 1 Dr. & War. 353, at p. 367; see also *Magee* v. *Lavell* (1874), L. R. 9 C. P. 107, 112; and *per* Lord ESHER, M.R., in *Roe* v. *Siddons* (1888), 22 Q. B. D. 224, at p. 233, C. A.: "The deed must be construed according to the ordinary rules of construction, one of which is that you are entitled to look at the circumstances existing at the date of the deed." See also *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1909] 1 Ch. 37, C. A., at pp. 46, 52.

(*o*) *Inglis* v. *Buttery* (1878), 3 App. Cas. 552, *per* Lord BLACKBURN, at p. 577. Thus, in ascertaining the premises granted by a lease, the parties have a right to prove all the circumstances connected with the state of the property at the time of the demise (*Osborn* v. *Wise* (1837), 7 C. & P. 761; *Hall* v. *Lund* (1863), 1 H. & C. 676, 684). The circumstances, by explaining the relative position of the parties—*e.g.*, which is buyer and which is seller—may remove an ambiguity on the contract (*Newell* v. *Radford* (1867), L. R. 3 C. P. 52).

SECT. 2. Admission of Extrinsic Evidence.

referring to each other, are part of the same transaction, so that they must be construed together (*p*); and evidence is admissible for this purpose (*q*).

Ordinary meaning of English and foreign words.

**788.** The rules already laid down as to the meaning to be ascribed to words (*r*) indicate the nature of the extrinsic evidence which can be adduced to arrive at their meaning. Primarily words are to be taken in their ordinary popular sense (*s*). Where there is any doubt as to the ordinary meaning, the court may have recourse to dictionaries to ascertain what the commonly received meaning is (*t*). Where the words are foreign, evidence is admissible to show what is the corresponding meaning in English (*a*). Similarly, evidence may be given of marks or cipher commonly used by the author of the instrument (*b*), but a mere obscurity of handwriting is for the court to solve (*c*).

Terms of science and art.

**789.** Technical words are primarily to be taken in their technical sense. As to technical legal terms (*d*) the court requires no evidence. Where the words are technical terms of science or art, the evidence of experts, or of books dealing with the subject, is admissible to inform the court of their meaning (*e*).

Local or class usage.

**790.** Where a word or phrase has a special meaning in a particular district or among a particular class, evidence of such special meaning may be given (*f*), and also evidence that the person using

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(*p*) See p. 439, *ante*. As to cases where the question may be complicated by the application of the Statute of Frauds, see title CONTRACT, Vol. VII., p. 369.

(*q*) *Harman* v. *Richards* (1852), 10 Hare, 81, 85; see title CONTRACT, Vol. VII., p. 370.

(*r*) See pp. 434—436, *ante*.

(*s*) See p. 434, *ante*.

(*t*) See an early example of recourse to a dictionary in *Matthew* v. *Purchins* (1608), Cro. Jac. 203.

(*a*) *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L., *per* PARKE, B., at p. 555. "Where the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue" (see *per* ERSKINE, J., at p. 511; *per* TINDAL, C.J., at p. 566).

(*b*) *Kell* v. *Charmer* (1856), 23 Beav. 195.

(*c*) *Remon* v. *Hayward* (1835), 2 Ad. & El. 666, n.

(*d*) *Shore* v. *Wilson*, *supra*, *per* ERSKINE, J., at p. 512; *Roddy* v. *Fitzgerald* (1858), 6 H. L. Cas. 823, *per* Lord WENSLEYDALE, at p. 877 (as to wills); *Leach* v. *Jay* (1877), 6 Ch. D. 496, *per* JESSEL, M.R., at p. 499; *Smith* v. *Butcher* (1878), 10 Ch. D. 113, 114.

(*e*) *Shore* v. *Wilson*, *supra*: "If the terms are technical terms of art, their meaning must . . . be ascertained by the evidence of persons skilled in the art to which they refer" (*per* ERSKINE, J., at p. 511; *per* TINDAL, C.J., at p. 566).

(*f*) Parol evidence is admissible "where technical words or peculiar terms, or indeed any expressions, are used which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes" (*Shore* v. *Wilson*, *supra*, at p. 567; *Grant* v. *Maddox* (1846), 15 M. & W. 737, *per* ALDERSON, B., at p. 745). Such parol evidence is equivalent to translation (*ibid.*, *per* PLATT, B., at p. 746). As to local meaning of terms of measurement, see *Barksdale* v. *Morgan* (1694), 4 Mod. Rep. 185, 186 ("acre"). "One thousand," as applied to rabbits, has been held in a particular district to mean 1,200 (*Smith* v. *Wilson* (1832), 3 B. & Ad. 728). In a mining lease "level" has been construed in the particular sense in which it was used by miners in the neighbourhood (*Clayton* v. *Gregson* (1835),

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it resided in such district or belonged to such class (*g*). But such evidence must refer to the general use of the word, and must lead to the conclusion that the author used the term in the particular instrument in the suggested sense; it must not be direct evidence that in the particular instrument he intended to use the word in some sense differing from its ordinary meaning (*h*). Moreover, evidence of this kind must not contradict the provisions of the deed; its effect must be limited to explaining them (*i*).

Mercantile contracts.

**791.** The admission of extrinsic evidence of the special meaning of words among a particular class or in a particular district is of most importance in regard to mercantile contracts. Where by the custom of the trade a particular meaning is given to a word or phrase, that is the meaning in which it is taken to be used in the written contract, and evidence of such customary meaning is admissible accordingly (*k*). This admission of evidence does not depend upon any ambiguity in the instrument to be construed, but merely upon the fact that the expression has, with reference to the subject-matter of the contract, acquired the peculiar meaning (*l*). Similarly the terms of a mercantile contract may be interpreted in accordance with local usage at the place where it is to be carried out (*m*). The evidence must be of general usage and practice

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4 Nev. & M. (K. B.) 602). And similarly as to terms which have acquired a peculiar sense in a particular trade (*Robertson* v. *French* (1803), 4 East, 130, 135).

(*g*) In *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L., the question was as to the meaning of the expression "godly preachers of Christ's Holy Gospel" as used by Lady Hewley in a deed of 1704. Evidence was admitted of the existence of a class of Trinitarian Protestant Dissenters by whom this phrase was used to denote their own ministers, and that Lady Hewley was a member of this party (see *ibid.*, pp. 528, 530, 550, 580). Consequently both Unitarians and Church of England clergymen were excluded; compare *Drummond* v. *A.-G.* (1849), 2 H. L. Cas. 837, as to "Protestant Dissenters."

(*h*) "Parol evidence of the particular meaning which the party affixed to his words" cannot be set up "to contradict or vary the plain language of the instrument itself" (see *per* TINDAL, C.J., in *Shore* v. *Wilson*, *supra*, at p. 566; *per* ERSKINE, J., at p. 514; *per* COLERIDGE, J., at p. 525; *Drummond* v. *A.-G.* (1849), 2 H. L. Cas. 837, 863).

(*i*) *A.-G.* v. *Clapham* (1855), 4 De G. M. & G. 591, 627.

(*k*) "If the instrument be a mercantile contract, the meaning of the terms must be ascertained by the jury according to their acceptation among merchants" (*Shore* v. *Wilson*, *supra*, *per* ERSKINE, J., at p. 511; *per* TINDAL, C.J., at pp. 566, 567; see *Smith* v. *Wilson* (1832), 3 B. & Ad. 728, *per* PARKE, J., at p. 733; *Myers* v. *Sarl* (1860), 3 E. & E. 306, *per* COCKBURN, C.J., at p. 315; *Hart* v. *Standard Marine Insurance Co.* (1889), 22 Q. B. D. 499, 500, C. A.). The usage of a particular trade, which must be proved by evidence until so often recognised that judicial notice can be taken of it, must be distinguished from the general usage of merchants, known as the law merchant (see *Lethulier's Case* (1692), 2 Salk. 443, *per* HOLT, C.J.; and as to the construction of usual and unusual contracts, see *Lewis* v. *Marshall* (1844), 7 Man. & G. 729, 745, n.).

(*l*) *Myers* v. *Sarl*, *supra*, *per* HILL, J., at p. 318; *per* BLACKBURN, J., at p. 319. "Neither in the construction of a contract among merchants, tradesmen, or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that" (*Brown* v. *Byrne* (1854), 3 E. & B. 703, *per* COLERIDGE, J., at p. 716).

(*m*) Thus, "in turn to deliver" in a charterparty will be construed in

prevailing in the particular trade or business, not the mere opinion of the witnesses as to the construction of the contract (*n*). It is admitted, not to contradict the document, but to explain the words used in it—to supply, as it were, the mercantile dictionary in which is to be found the mercantile meaning of the words which are used (*o*).

Ancient documents.

**792.** Where the instrument is of ancient date, then, whether the words are taken in their ordinary popular sense, or are taken in the sense given to them by a particular class or in a particular place, evidence will be admitted of the meaning of the words at the date of the instrument (*p*), and such evidence may properly be given by reference to historical and other works (*q*).

Identification.

**793.** When the meaning of the words of the instrument has been ascertained, whether their ordinary popular meaning or their special meaning—such special meaning being determined by the context or by extrinsic evidence—it is still necessary to ascertain the particular persons or things to which, in accordance with such meaning, they apply, and this involves the admission of further evidence—namely, such evidence as is necessary to identify the person or thing mentioned in the instrument (*r*).

SUB-SECT. 3.—*Evidence of Conduct and Acts under an Instrument to explain it when doubtful.*

Evidence of conduct.

**794.** If, after other methods of interpretation have been exhausted, there remains a doubt as to the effect of the instrument, it is permissible to give evidence of the acts done under it as a guide to the intention of the parties (*s*); in particular, of acts done shortly after the date of the instrument (*t*). But evidence of the acts done cannot be admitted to contradict the clear meaning of the instrument (*a*).

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accordance with the meaning of the phrase at the port of delivery (*Robertson* v. *Jackson* (1845), 2 C. B. 412).

(*n*) *Lewis* v. *Marshall* (1844), 7 Man. & G. 729, 744.

(*o*) *Bowes* v. *Shand* (1877), 2 App. Cas. 455, *per* Lord CAIRNS, L.C., at p. 468.

(*p*) Where, that is, "by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed" (*per* TINDAL, C.J., in *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L., at p. 566; see *per* COLERIDGE, J., at pp. 527, 528; *per* GURNEY, B., at p. 545; *Drummond* v. *A.-G.* (1849), 2 H. L. Cas., 837, *per* Lord CAMPBELL, at p. 863).

(*q*) *Shore* v. *Wilson*, *supra*, *per* MAULE, J., at pp. 501, 502.

(*r*) "For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible, viz., every material fact that will enable the court to identify the person or thing mentioned in the instrument" (*Shore* v. *Wilson*, *supra*, *per* PARKE, B., at p. 556; *Waterpark* v. *Fennell* (1859), 7 H. L. Cas. 650, *per* Lord CHELMSFORD, at p. 678).

(*s*) "If the words of the instrument be ambiguous, we may call in the acts done under it as a clue to the intention of the parties" (*per* TINDAL, C.J., in *Doe* d. *Pearson* v. *Ries* (1832), 8 Bing. 178, at p. 181; repeated in *Chapman* v. *Bluck* (1838), 4 Bing. (N. C.) 187, at p. 193; see *Wadley* v. *Bayliss* (1814), 5 Taunt. 752).

(*t*) This principle is expressed in the maxim *Contemporanea expositio est fortissima in lege* (2 Co. Inst. 136).

(*a*) *Clifton* v. *Walmesley* (1794), 5 Term Rep. 564; *Forbes* v. *Watt* (1872), L. R. 2 H. L. Sc. 214; *North Eastern Rail. Co.* v. *Hastings* (*Lord*), [1900] A. C. 260, 263, 270; and see *Marshall* v. *Berridge* (1881), 19 Ch. D. 233.

SECT. 2. Admission of Extrinsic Evidence.

Evidence of contemporaneous usage as to ancient documents.

The principle of construction by contemporaneous usage is primarily applicable to ancient documents (*b*). But here, also, before evidence of such usage can be admitted there must be a doubt on the construction of the instrument, either by reason of the occurrence of general words (*c*) or because, in consequence of lapse of time, the words may have changed their meaning (*d*), or on account of some other uncertainty or ambiguity (*e*). Contemporary usage is not admissible to contradict the clear meaning of the instrument (*f*). An ancient instrument, for the present purpose, appears to be one that dates from beyond the time of living memory (*g*).

Modern usage.

**795.** The evidence is not restricted to direct evidence of contemporaneous usage, which it would frequently be impossible to procure. Modern usage, if there is nothing to countervail it, raises a presumption that the usage was the same immediately after the date of the instrument, and consequently evidence of modern usage is admissible to explain an ancient deed (*h*).

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(*b*) "In the construction of ancient grants and deeds, there is no better way of construing them than by usage" (*A.-G.* v. *Parker* (1747), 3 Atk. 576, *per* Lord HARDWICKE, L.C., at p. 577; 9 Co. Rep. 28 a, n. (F)). "One of the most settled rules of law for the construction of ambiguities in ancient instruments is, that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what that deed means" (*A.-G.* v. *Drummond* (1842), 1 Dr. & War. 353, *per* SUGDEN, L.C., at p. 368); see *Drummond* v. *A.-G.* (1849), 2 H. L. Cas. 837, *per* Lord COTTENHAM, at p. 861; *per* Lord CAMPBELL, at p. 863; compare *A.-G.* v. *Brasenose College* (1834), 2 Cl. & Fin. 295, 317; *Hebbert* v. *Purchas* (1871), L. R. 3 P. C. 605, 650; and as to charities, see *A.-G.* v. *Bristol Corporation* (1820), 2 Jac. & W. 294, 321; *A.-G.* v. *Boston Corporation* (1847), 1 De G. & Sm. 519, 527.

(*c*) "When a grant of remote antiquity contains general words, the best exposition of such a grant is long usage under it" (*Chad* v. *Tilsed* (1821), 2 Brod. & Bing. 403, *per* DALLAS, C.J., at p. 406). "However general the words of the ancient deeds may be, they are to be construed, as Lord COKE says, by evidence of the manner in which the thing has been always possessed and used" (*Weld* v. *Hornby* (1806), 7 East, 195, *per* Lord ELLENBOROUGH, C.J., at p. 199; *Waterpark* v. *Fennell* (1859), 7 H. L. Cas. 650, *per* Lord CRANWORTH, at p. 680).

(*d*) See *Hastings* (*Lord*) v. *North Eastern Rail. Co.*, [1899] 1 Ch. 656, C. A., *per* LINDLEY, M.R., at p. 663. Thus, in ascertaining the meaning of terms in an ancient trust deed at the time of execution, evidence is admissible of "the early and contemporaneous application of the funds of the charity itself by the original trustees" (*Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L., *per* TINDAL, C.J., at p. 569).

(*e*) "There can be no doubt that contemporaneous usage may be resorted to for the purpose of explaining any uncertainty or ambiguity in an ancient grant; but then there must be 'uncertainty or ambiguity'" (*Hastings* (*Lord*) v. *North Eastern Rail. Co.*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 661; *Doe* d. *Kinglake* v. *Beviss* (1849), 7 C. B. 465, 504; *De la Warr* (*Earl*) v. *Miles* (1881), 17 Ch. D. 535, 573, C. A.).

(*f*) "In the case of a grant no usage, however long, can countervail the clear words of the instrument, for what is done under usurpation cannot constitute a legal usage" (*Chad* v. *Tilsed* (1821), 2 Brod. & Bing. 403, *per* DALLAS, C.J., at p. 406); see *R.* v. *Varlo* (1775), 1 Cowp. 248, *per* Lord MANSFIELD, C.J., at p. 250.

(*g*) See *North Eastern Rail. Co.* v. *Hastings* (*Lord*), [1900] A. C. 260, *per* Lord DAVEY, at p. 269. Where *contemporanea expositio* is relied on upon the ground that the meaning of the words has changed, the instrument must be old enough to permit of this change (*Hastings* (*Lord*) v. *North Eastern Rail. Co.*, *supra*, *per* LINDLEY, M.R., at p. 663). See also title CUSTOM AND USAGES, p. 222, *ante*.

(*h*) *Chad* v. *Tilsed*, *supra*, at p. 406; *Beaufort* (*Duke*) v. *Swansea Corporation*

And it would seem that the principle may also be invoked for the purpose of construing modern instruments, though this is, perhaps, not always recognised (*i*).

SUB-SECT. 4.—*Evidence of Intention to explain a Latent Ambiguity.*

No evidence of intention to explain patent ambiguities.

**796.** When the meaning of the words of the instrument has been ascertained by intrinsic evidence, and by such extrinsic evidence as is admissible for that purpose, it may be that the instrument as thus interpreted fails to indicate with certainty any specific intention on the part of the author. The instrument shows on its face that the author has contradicted himself, or has expressed alternative intentions without deciding in favour of either, or has omitted something necessary completely to define his meaning. The instrument is then said to be ambiguous, and the ambiguity is called a patent ambiguity (*k*). No direct evidence of intention can

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(1849), 3 Exch. 413, 425; *Waterpark* v. *Fennell* (1859), 7 H. L. Cas. 650, 684; *Simpson* v. *Dendy* (1860), 8 C. B. (N. S.) p. 473; *Hastings Corporation* v. *Ivall* (1874), L. R. 19 Eq. 558, 581; *De la Warr* (*Earl*) v. *Miles* (1881), 17 Ch. D. 535, 573, C. A. Similarly, in a question of prescription, "usage continued during living memory, when there is nothing to the contrary," may "justify the presumption of a similar usage from time immemorial" (*Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135, *per* Lord SELBORNE, L.C., at p. 156). As to modern usage, carried back for a considerable time, interpreting a doubtful statute, see *Dunbar* (*Magistrates*) v. *Roxburghe* (*Duchess*) (1835), 3 Cl. & Fin. 335, 354, H. L.

(*i*) *Van Diemen's Land Co.* v. *Table Cape Marine Board*, [1906] A. C. 92, 98. The *dictum* of TINDAL, C.J., cited in note (*s*) on p. 451, *ante*, referred to a modern instrument. And it is possible to confine certain *dicta* which seem to exclude such evidence in the case of modern instruments to cases where it is attempted to use the conduct of the parties to contradict the clear meaning of the document (see p. 445, note (*d*), *ante*). In cases of ambiguity it appears to be a sensible and proper course to accept the interpretation of the parties as shown by their own acts: *Optimus interpres rerum usus* (2 Co. Inst. p. 282); compare *Sadlier* v. *Biggs* (1853), 4 H. L. Cas. 435, 458.

The court will not construe a covenant for renewal of a lease as a covenant for perpetual renewal because successive renewals have been made each containing the same covenant. But this is exceptional, and is based on the ground that a covenant for perpetual renewal must be perfectly clear (*Baynham* v. *Guy's Hospital* (1796), 3 Ves. 295); yet even here the King's Bench, with Lord MANSFIELD at its head, treated it as plain that the covenant should be construed by the conduct of the parties (*Cooke* v. *Booth* (1778), 2 Cowp. 819). The controversy arising out of this incident seems to have induced declarations in the Court of Chancery that evidence of conduct was never admissible (*Baynham* v. *Guy's Hospital*, *supra*; *Eaton* v. *Lyon* (1798), 3 Ves. 690, 694; *Iggulden* v. *May* (1804), 9 Ves. 325; *Balfour* v. *Welland* (1809), 16 Ves. 151, 156); see *Douglas* v. *Allen* (1842), 1 Con. & Law. 367; *Burrowes* v. *Hayes* (1834), Hayes & Jo. 597).

(*k*) "There be two sorts of ambiguities of words; the one is *ambiguitas patens* and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity" (Bacon's Law Tracts, p. 99). For an instance of a patent ambiguity arising out of contradiction, see *Saunderson* v. *Piper* (1839), 5 Bing. (N. C.) 425, where in a bill of exchange the amounts in writing and in figures were different, though for a reason peculiar to that class of instrument the written amount prevailed; for one arising out of the writer's failure to make up his own mind, see Shep. Touch. 251—a grant "to one of the children of J. S."; for one arising from omission to state the intention definitely, see *Altham's Case* (1610), 8 Co. Rep. 150 b, 155 a

SECT. 2. **Admission of Extrinsic Evidence.**

be given to resolve such an ambiguity. Sometimes it may be cured by election (*l*), but otherwise the deed is void for uncertainty (*m*).

Evidence of intention admitted to explain latent ambiguities.

**797.** When the instrument appears on its face to be free from ambiguity, but, upon the endeavour being made to apply it to the persons or things indicated, it appears that the words are equally applicable to two or more persons, or to two or more things, there is a latent ambiguity (*n*). The ambiguity—in this case also called an equivocation (*o*)—is not discovered till the instrument comes to be applied to external circumstances. Direct evidence of the author's intention may be then given for the purpose of ascertaining which of the several persons or things to whom the words are applicable was intended to be denoted (*p*).

SECT. 3.—*Correction of Errors by Intrinsic Evidence.*

Where necessary, words may be rejected, supplied or transposed.

**798.** Since an instrument is to be construed according to the intention of the parties as appearing from the whole of its contents, it follows that such intention must not be defeated by too strict an adherence to the actual words (*q*), and any corrections may be made which a perusal of the document shows to be necessary. Thus, wrong grammar and spelling may be corrected (*r*); words

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(a limitation to two "*et heredibus*"); *Pearce* v. *Watts* (1875), L. R. 20 Eq. 492 (reservation of the land "necessary" for making a railway). There is a latent ambiguity where a man makes a gift to his nephew John, and it appears that he has two nephews of this name.

(*l*) See p. 457, *post*.

(*m*) "All ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some cases by election, but never by averment, but rather shall make the deed void for uncertainty" (Bacon's Law Tracts, p. 99). "Where there is a doubt on the face of the instrument, the law admits no extrinsic evidence to explain it" (*Saunderson* v. *Piper* (1839), 5 Bing. (N. C.) 425, *per* TINDAL, C.J., p. 431). "No averment *dehors* can make that good, which upon consideration of the deed is apparent to be void" (*Altham's Case* (1610), 8 Co. Rep. 150 b, 155 a); see *Committee of London Clearing Bankers* v. *Inland Revenue Commissioners*, [1896] 1 Q. B. 222, *per* WRIGHT, J., p. 227.

(*n*) See note (*k*) on p. 453, *ante*.

(*o*) *Doe* d. *Hiscocks* v. *Hiscocks* (1839), 5 M. & W. 363, 369; *Douglas* v. *Fellows* (1853), Kay, 114, 120.

(*p*) *Smith* v. *Jeffryes* (1846), 15 M. & W. 561, 562; *Altham's Case* (1610), 8 Co. Rep. 150 b, 155 a; *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, H. L., *per* ERSKINE, J., at p. 517; *per* PARKE, B., at p. 557; *Waterpark* v. *Fennell* (1859), 7 H. L. Cas. 650, *per* Lord WENSLEYDALE, at p. 685; *Roden* v. *London Small Arms Co.* (1876), 46 L. J. (Q. B.) 213; compare *Beaumont* v. *Field* (1818), 1 B. & Ald. 247. As to wills, see *Cheyney's* (*Lord*) *Case* (1591), 5 Co. Rep. 68 a, and title WILLS.

(*q*) *Qui hæret in litera, hæret in cortice* (Shep. Touch. 87); *Northumberland* (*Earl*) v. *Egremont* (*Earl*) (1759), 1 Eden, 435, 446. See the third rule reported to have been laid down by STAUNFORD, J., in *Throckmerton* v. *Tracy* (1555), 1 Plowd. 145, 160: "Thirdly, that the words shall be construed according to the intent of the parties and not otherwise; and here he cited what Bracton saith, *Carta non est nisi vestimentum donationis;* and the intent directs gifts more than the words." So WILLES, C.J., in *Smith* v. *Packhurst* (1742), 3 Atk. 135, at p. 136: "Such a construction should be made of the words in a deed as is most agreeable to the intention of the grantor; the words are not the principal things in a deed, but the intent and design of the grantor."

(*r*) *Falsa grammatica non vitiat concessionem. Falsa orthographia non vitiat chartam* (Shep. Touch. 55, 87); *Shrewsbury's* (*Earl*) *Case* (1610), 9 Co. Rep. 46 b, 48 a. False grammar includes a case where the writer has stated the reverse

that are merely insensible (*s*), or that are repugnant (*t*), and even whole provisions (*a*), may be rejected; words may, though more sparingly, be supplied (*b*); and words and clauses may be

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of what he obviously meant, as where a bond is conditioned to be void on failure to make the stipulated payment (*Vernon* v. *Alsop* (1662), 1 Lev. 77: "The obligation shall not be of no effect, if by any means it may be made good"). See *Langdon* v. *Goole* (1681), 3 Lev. 21. A double negative does not make an affirmative if the contrary intention is clear (Shep. Touch. 87). Cases of erroneous spelling are numerous in the early reports (Norton on Interpretation, p. 93). Many of these are on Latin words, as in *Walter* v. *Pigot* (1602), Cro. Eliz. 896; Moore (K. B.), 645, where *septuagintis* was read *septingentis* so as to make the penalty on a bond £750, the bond being for £500; and in *Matthew* v. *Purchins* (1608), Cro. Jac. 203, where *nobulis* was corrected to *nobilibus* (6*s.* 8*d.*).

(*s*) *Smith* v. *Packhurst* (1742), 3 Atk. 135, 136 (the court "may reject any words that are merely insensible"); *Goodman* v. *Knight* (1614), Cro. Jac. 358; *Langdon* v. *Goole* (1681), 3 Lev. 21; *Hanbury* v. *Tyrell* (1856), 21 Beav. 322, 327.

(*t*) See *Wilson* v. *Wilson* (1847), 15 Sim. 487, where in an indemnity given to A. against liability for rents and outgoings as from a future day, and against "*all the present debts and liabilities*" of A., the words in italics were rejected as repugnant; *Holmes* v. *Ivy* (1678), 2 Show. 15, where in a condition to a bond for "the delivery of 35,000 tiles to the value of £144 at 15*s.* 6*d.* a thousand," the "35,000" (which should have been 185,000) was rejected; and compare *Gwyn* v. *Neath Canal Co.* (1868), L. R. 3 Exch. 209. As to rejecting words repugnant to words of limitation, see title REAL PROPERTY AND CHATTELS REAL.

(*a*) *Glynn* v. *Margetson & Co.*, [1893] A. C. 351, *per* Lord HALSBURY, L.C., at p. 357.

(*b*) The court, it has been said, has no power "to alter the words or to insert words which are not in the deed" (*per* WILLES, C.J., in *Smith* v. *Packhurst* (1742), 3 Atk. 135, at p. 136). But this goes too far. There are numerous instances where words accidentally omitted have been supplied. "The law will, as much as it can, assist the frailties and infirmities of men in their employments, who, in drawing long deeds, may easily make a slip" (*Say and Seel's* (*Lord*) *Case* (1711), 10 Mod. Rep. 40, 47). Thus the name of the grantor has been inserted in the granting part of the deed (*Say and Seel's* (*Lord*) *Case, supra*; *Trethewy* v. *Ellesdon* (1690), 2 Vent. 141); though where there were grantors of separate properties, the insertion of the name of the wrong grantor of one property was held not to be curable by construction (*Mill* v. *Hill* (1852), 3 H. L. Cas. 828, 847—850). The omission of the name of the grantee in the premises has been supplied from the habendum (*Butler* v. *Dodton* (1579), Cary, 86; compare *Bustard* v. *Coulter* (1603), Cro. Eliz. 902, 917; and see *Spyve* v. *Topham* (1802), 3 East, 115, where the trustee's name was substituted in the premises for that of the *cestui que trust*, which had been erroneously inserted there). So the name of the obligee of a bond may be supplied from the context (*Langdon* v. *Goole* (1681), 3 Lev. 21); and in *Coles* v. *Hulme* (1828), 8 B. & C. 568, the sum of "7700" in the penalty of a bond was read "£7,700." "In every deed," said Lord TENTERDEN, C.J., in this last case, "there must be such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties." The supplying of necessary words is an instance of the maxim *Ut res magis valeat quam pereat* (*Langston* v. *Langston* (1834), 2 Cl. & Fin. 194, 243). But it can only be done where clearly required to avoid an absurdity, repugnancy, or inconsistency (*Clements* v. *Henry* (1859), 10 I. Ch. R. 79, where the court refused to insert "hereinbefore").

Other instances of supplying words are:—"Life" supplied in the memorial of an annuity (*Flight* v. *Lake* (*Lord*) (1835), 2 Bing. (N. C.) 72); "hereinbefore declared" read as "hereinbefore recited to have been declared" (*Hanbury* v. *Tyrell* (1856), 21 Beav. 322, 326); "without issue" supplied in marriage articles so as to make a gift over take effect only on death without issue and so save the interests of children (*Targus* v. *Puget* (1751), 2 Ves. Sen. 194; *Kentish* v. *Newman* (1713), 1 P. Wms. 234); all children who "being sons" should attain twenty-one read as "being sons or daughters" (*Re Daniel's Settlement Trusts* (1875), 1 Ch. D. 575, C. A.; and see *Wight* v. *Dicksons* (1813), 1 Dow, 141, H. L.,

SECT. 3. Correction of Errors by Intrinsic Evidence.

transposed (*c*). Abbreviations will be construed so as to give effect to the instrument (*d*). And the court will, from the general frame of a settlement, collect the intent contrary to the effect of a particular clause (*e*). Hence the rule:—

When the court can clearly collect from the language within the four corners of a deed, or other instrument in writing, the real intention of the parties, it is bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned (*f*).

Repugnant clauses.

**799.** If there are two clauses or parts of a deed repugnant to each other the first will be received and the latter rejected, unless there is some special reason to the contrary (*g*). But this is an expedient to which the court very reluctantly has recourse, and never until it has exhausted every other means in its power to reconcile apparent inconsistencies (*h*) And the rule is subordinate to the general principle that the intention must be ascertained from the entire contents of the deed (*i*). Hence, when one clause is in accordance with, and the other is opposed to, the real intention, the

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and compare, as to a will, *Greenwood* v. *Greenwood* (1877), 5 Ch. D. 954, C. A.). But the court will not supply a word so as to alter the legal effect of limitations as expressed; it will not read "in fee" as "in fee simple" (*Re Ethel and Mitchel's and Butler's Contract*, [1901] 1 Ch. 945).

(*c*) "Words shall be transposed and marshalled so as the feoffment or grant may take effect" (Co. Litt. 217 b). In *Uvedale* v. *Halfpenny* (1723), 2 P. Wms. 151, a portions term in a marriage settlement was transposed so as to take precedence of the limitations in tail; in *Fenton* v. *Fenton* (1837), 1 Dr. & Wal. 66, a power to make provision for "such younger child or children," following a limitation to sons, was transposed so as to follow a limitation to daughters, and enable "such" to refer to both sons and daughters.

(*d*) *Ille numerus et sensus abbreviationum accipiendus est ut concessio non sit inanis:* thus "*tot' ill' maner'*" in an old deed might be read in the singular or plural, according to the context (*Shrewsbury's (Earl) Case* (1610), 9 Co. Rep. 46 b, 48 a).

(*e*) *Northumberland (Earl)* v. *Egremont (Earl)* (1759), 1 Eden, 435, *per* HENLEY, Lord Keeper, at p. 446; *Arundell* v. *Arundell* (1833), 1 My. & K. 316. A term given absolutely has been held to be determinable on death without express words to that effect (*Coryton* v. *Helyar* (1745), 2 Cox, Eq. Cas. 340).

(*f*) *Gwyn* v. *Neath Canal Co.* (1868), L. R. 3 Exch. 209, *per* KELLY, C.B., at p. 215; *Beaumont* v. *Salisbury (Marquis)* (1854), 19 Beav. 198, *per* ROMILLY, M.R., at p. 206. For cases on the construction of an instrument where a printed form had been used, see *Robertson* v. *French* (1803), 4 East, 130, at p. 135; *Glynn* v. *Margetson & Co.*, [1893] A. C. 351, at pp. 354, 358.

(*g*) "The general rule is that, if there be a repugnancy, the first words in a deed, and the last words in a will shall prevail" (*Doe* d. *Leicester* v. *Biggs* (1809), 2 Taunt. 109, *per* Lord MANSFIELD, C.J., at p. 113; *Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9, *per* WILLES, J., at p. 12; Shep. Touch. 88; *Cole* v. *Sury* (1626), Lat. 264; *Re Webber's Settlement* (1850), 17 Sim. 221, 222; *Bush* v. *Watkins* (1851), 14 Beav. 425, 432). Thus in a gift in frank-marriage a clause reserving rent was void (*Cother* v. *Merrick* (1657), Hard. 89, 94). In *Seaman's Case* (1610), Godb. 166, a lease was made habendum, after an existing term, for twenty-three years, *to be accounted from the date of these presents;* the latter words were rejected, and the twenty-three years ran from the end of the existing term. In *Cope* v. *Cope* (1846), 15 Sim. 118, in the phrase "£1,000 sterling lawful money *of Ireland*," the words "of Ireland" were rejected.

(*h*) *Bush* v. *Watkins, supra.*

(*i*) See p. 438, *ante.*

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former must be received and the latter rejected whatever their relative position (*k*).

A covenant which, taken by itself, is clearly a personal covenant cannot be qualified by a proviso excluding personal liability; such a proviso is repugnant and must be rejected (*l*). But a proviso which is at first sight repugnant to the principal clause may be reconciled with it by varying the effect of that clause. Thus a release to one of two partners, with a proviso that the release shall not prejudice the claims of the releasor against the other partner, operates not as a release—in which case the proviso would be repugnant—but as a covenant not to sue (*m*).

Repugnant provisoes.

SECT. 4.—*When an Instrument is Void for Uncertainty.*

**800.** An uncertainty upon a written instrument which remains after all methods of interpretation have been exhausted may sometimes be removed by the election of one of the parties; as (1) where there is a grant of one of certain definite things (*n*), or of land defined in amount, but indefinite in position (*o*); or (2) where a grant of a definite thing may operate in either of two ways (*p*). But in the former case there must be a certainty in the nature or amount of the gift, and an uncertainty only in the specific gift; if the gift is such as to be reducible to certainty, not by mere election, but by assessment or other means for which no provision is made, the uncertainty cannot be removed (*q*). There is no right of election against the Crown (*r*).

Uncertainty removable by election.

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(*k*) "There is no doubt that . . . effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected" (*Walker* v. *Giles* (1848), 6 C. B. 662, *per* WILDE, C.J., at p. 702; *Parkhurst* v. *Smith* (1742), Willes, 327, 332); compare *Re Bywater*, *Bywater* v. *Clarke* (1881), 18 Ch. D. 17, 24, C. A., as to wills.

(*l*) *Furnivall* v. *Coombes* (1843), 5 Man. & G. 736, 751, 752; compare *Seagood* v. *Hone* (1634), Cro. Car. 366, as to a proviso postponing the immediate operation of a surrender of copyholds. But a proviso merely limiting the personal liability under the covenant, without destroying it, is good (*Williams* v. *Hathaway* (1877), 6 Ch. D. 544, 549).

(*m*) *Solly* v. *Forbes* (1820), 2 Brod. & Bing. 38; compare *Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9, where a deed of arrangement releasing the debtor, with a proviso reserving the rights of creditors against securities or sureties, was similarly construed.

(*n*) "If I give you one of my horses, although that be uncertain, yet by your election that may be a good gift" (*Mervyn* v. *Lyds* (1553), 1 Dyer, 90 a, 91 a; Shep. Touch. 250; Vin. Abr. tit. Grants, H, 5; Bac. Abr. tit. Grants, H, 3; *Savill Brothers, Ltd.* v. *Bethell*, [1902] 2 Ch. 523, 538, C. A.).

(*o*) "The moiety of a yard-land" in a certain waste (*Hungerford's Case* (1585), 1 Leon. 30); a lease of a farm containing 437 acres "except 37 acres thereof" (*Jenkins* v. *Green* (No. 1) (1858), 27 Beav. 437).

(*p*) *Heyward's* (*Sir Rowland*) *Case* (1595), 2 Co. Rep. 35 a, where the instrument might operate either as a demise or a bargain and sale.

(*q*) As a sale of all the trees "that can be spared" (*Mervyn* v. *Lyds*, *supra*); a reservation of "the necessary land for making a railway" (*Pearce* v. *Watts* (1875), L. R. 20 Eq. 492); "If I bargain with you that I will give you for your land as much as it is reasonably worth, this is void for default of certainty; but if the judging of this be referred to a third person, and he adjudge it, then it is good" (*Mervyn* v. *Lyds*, *supra*).

(*r*) *Hungerford's Case*, *supra*; *Brand* v. *Todd* (1618), Noy, 29; but any reference in the grant which enables the thing granted to be ascertained with

SECT. 4.
**When an Instrument is Void for Uncertainty.**

**801.** Where an uncertainty is curable by election, the election lies with the party who has to do the first act towards completion of the grant (*s*); thus, where the grant has been actually made, though in an uncertain form, the grantee can complete it by taking one of the various things offered him (*t*), or by otherwise selecting the particular gift within the specified limits (*a*). But if the matter lies only in agreement, then the grantor can fulfil his agreement in accordance with his own election (*b*). In the case of a lease determinable at various periods the option of determining it lies with the lessee (unless otherwise provided); this result is assisted by the maxim that the lease is to be construed most favourably to the lessee (*c*).

Who is to elect.

When election to be made.

If no interest passes until the election, the election must be made in the lifetime of the parties, as where A. gives to B. one of his horses. The certainty begins, and the property passes, when the election is made by B. taking a particular horse; and this must be in the lifetime of the donor and donee. But if an interest passes, and the only doubt is as to the title by which it shall be taken, then the continued life of the parties is not necessary (*d*).

When conveyance under election void.

If the election relates to a particular piece of land which is to be granted or reserved, and the conveyance is to operate at common law and not under the Statute of Uses, the effect of the conveyance and subsequent election would be to create a freehold *in futuro*, and hence the conveyance is void (*e*).

Deed void when finally unintelligible or doubtful.

**802.** If after every effort has been made to construe the deed by intrinsic evidence, with the assistance of such extrinsic evidence as is admissible under the foregoing rules (including in the case of a

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certainty will be sufficient to validate the grant (*Doe* d. *Devine* v. *Wilson* (1855), 10 Moo. P. C. C. 502, 525).

(*s*) "He who is the first agent, and ought to do the first act, shall have the election" (*Heyward's* (*Sir Rowland*) *Case* (1595), 2 Co. Rep. 35 a, 36 a, 37 a; Co. Litt. 145 a).

(*t*) *Mervyn* v. *Lyds* (1553), 1 Dyer, 90 a, 91 a; Shep. Touch. 251. "If A. says to B., 'I grant you a horse out of my stable,' he puts it in the power of B. to take which horse he shall think proper" (*Dann* v. *Spurrier* (1803), 3 Bos. & P. 399, 403). See also *Reed* v. *Kilburn Co-operative Society* (1875), L. R. 10 Q. B. 264.

(*a*) As where there is a grant of a specified amount of land in a defined larger area (*Hungerford's Case* (1585), 1 Leon. 30), or a reservation in similar form (*Jenkins* v. *Green* (No. 2), (1859) 27 Beav. 440), or a grant of land of specified annual value (*Calthrop's Case* (1574), Moore (K. B.), 101). In *Lee's Case* (1578), 1 Leon. 268, which appears to be *contra*, the alienation was perhaps not complete.

(*b*) Under an agreement to grant a lease of a farm of 437 acres, reserving 37 acres, the selection is to be made by the person granting the lease (*Jenkins* v. *Green* (No. 2), *supra*); if a condition be, that the obligor shall enfeoff a man of estate D. or S. upon request, the obligor has his election of which of the two he shall enfeoff him (1 Roll. Abr. tit. Condition (Y), pl. 3, p. 446; *Dann* v. *Spurrier* (1803), 3 Bos. & P. 399, 403).

(*c*) *Dann* v. *Spurrier*, *supra*; *Doe* d. *Webb* v. *Dixon* 1807), 9 East, 15; *Powell* v. *Smith* (1872), L. R. 14 Eq. 85.

(*d*) See *Heyward's* (*Sir Rowland*) *Case*, *supra*: "Where the things are several, nothing passes before election, and the election ought to be precedent; but when one and the same thing shall pass, there it passeth presently, and the election of the title may be subsequent"; *Savill Brothers, Ltd.* v. *Bethell*, [1902] 2 Ch. 523, 539, C. A.

(*e*) *Bullock* v. *Burdett* (1568), 3 Dyer, 281 a; *Savill Brothers, Ltd.* v. *Bethell*, *supra*, at p. 540.

latent ambiguity direct evidence of intention), the deed is unintelligible (*f*), or there remains an uncertainty which is not removable by election, either the whole deed or the particular clause, as the case may require, will be held void for uncertainty (*g*). But this is only done with reluctance (*h*); and in cases of ambiguity it is a settled canon of construction that a construction which will make the clause valid is to be preferred to one which will make it void (*i*).

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## SECT. 5.—*Recitals.*

### SUB-SECT. 1.—*Variance between Recitals and Operative Part.*

Effect of recitals on construction.

**803.** In the construction of an instrument the recitals are subordinate to the operative part, and consequently, where the operative part is clear, this is treated as expressing the intention of the parties, and it prevails over any suggestion of a contrary intention afforded by the recitals; but where the operative part is doubtful, then the recitals can be used to explain its meaning (*k*);

(*f*) Thus, where a lessor of minerals reserves to himself rights of working the non-demised minerals by a clause to which no definite meaning can be given, the clause will be rejected (*Mundy* v. *Rutland* (*Duke*) (1883), 23 Ch. D. 81, C. A.).

(*g*) *Mervyn* v. *Lyds* (1553), 1 Dyer, 90 a (a patent ambiguity not curable by election); *Cheyney's* (*Lord*) *Case* (1591), 5 Co. Rep. 68 a (a latent ambiguity, where there was no direct evidence of intention to determine it); see Bacon, Elementary Rules, r. 23; Shep. Touch. 250, 251. An uncertainty as to the commencement of a lease cannot be cured by election (*Anon.* (1674), 1 Mod. Rep. 180; though see *Anon.* (1591), 1 Leon. 227).

(*h*) "The books are full of cases where every shift, if I may so speak, has been resorted to, rather than hold the gift void for uncertainty" (*Doe* d. *Winter* v. *Perratt* (1843), 6 Man. & G. 314, H. L., *per* Lord BROUGHAM, at p. 362 (on a will)).

(*i*) *Mills* v. *Dunham*, [1891] 1 Ch. 576, C. A., *per* KAY, L.J., at p. 590; and it seems that the court will not allow an agreement to be ineffective on the ground of uncertainty, where the defendant's dealing has been unfair. The plaintiff would perhaps be entitled to the whole estate if the part could not be ascertained (*Chattock* v. *Muller* (1878), 8 Ch. D. 177).

(*k*) *Bailey* v. *Lloyd* (1829), 5 Russ. 330, *per* LEACH, M.R., at p. 344; see *Walsh* v. *Trevanion* (1850), 15 Q.B. 733, *per* PATTESON, J., at p. 751; *Young* v. *Smith* (1865), 35 Beav. 87, *per* ROMILLY, M.R., at p. 90; *Re Moon, Ex parte Dawes* (1886), 17 Q. B. D. 275, C. A., *per* Lord ESHER, M.R., at p. 286; *Orr* v. *Mitchell*, [1893] A. C. 238, *per* Lord MACNAGHTEN, at p. 254. A recital cannot control clear words in the operative part; see *Holliday* v. *Overton* (1852), 14 Beav. 467, 470; *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1819), 2 B. & Ald. 625; *Alexander* v. *Crosbie* (1835), L. & G. *temp.* Sugd. 145; *Leggott* v. *Barrett* (1880), 15 Ch. D. 306, C. A., *per* BRETT, L.J., at p. 311; *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354, C. A., *per* JESSEL, M.R., at p. 358. On the other hand, a recital may explain doubtful words in the operative part; see *Re Michell's Trusts* (1878), 9 Ch. D. 5, C. A., *per* JESSEL, M.R., at p. 9: "We may consider it settled by authority, that where the words of a covenant are ambiguous and difficult to deal with, we may resort to the recitals to see whether they throw any light on its meaning"; see *Bath* (*Earl*) *and Mountague's* (*Earl*) *Case* (1693), 3 Cas. in Ch. 55, 101. And though the words of the operative part might by themselves be capable of a different meaning from that suggested by the recitals, yet recourse may be had to the recitals to explain them (*Gwyn* v. *Neath Canal Co.* (1868), L. R. 3 Exch. 209, *per* CHANNELL, B., at p. 219; *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 99—101; *Re Coghlan, Broughton* v. *Broughton*, [1894] 3 Ch. 77, 84). It has sometimes been suggested that a perfectly clear recital may control the operation of a deed (*Boyd* v. *Petrie* (1872), 7 Ch. App. 383, 392; *Australian Joint Stock Bank* v. *Bailey*, [1899] A. C. 396, P. C.); but where the

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and while, for the purpose of construing the operative part, the whole of the instrument may be referred to, yet the recitals leading up to it are more likely to furnish the key to its true construction than the subsidiary clauses of the deed (*l*). Recourse may be had to a recital to determine as between two possible meanings of the operative part, although one of the meanings is the more obvious, and would necessarily be preferred if no light could be derived from the rest of the deed (*m*). A recital may be used to affirm a result which the deed would naturally produce, and which is not expressed in the operative part (*n*). A misrecital of an interest which is referred to in the operative part will not affect the construction if the intention is clear (*o*).

Operative part not controlled by recitals.

**804.** The following are instances of the failure of recitals to control the operative part:—Where a bond recites the penalty as a sum smaller than the penal sum actually mentioned (*p*). Parcels in a deed described with certainty are not cut down by recitals showing that something less was intended to pass (*q*); nor are

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court cannot effect the intention by giving the operative words a meaning which they will fairly bear, the proper remedy is to rectify the deed (*Gwyn* v. *Neath Canal Co.* (1868), L. R. 3 Exch. 209; *Young* v. *Smith* (1865), 35 Beav. 87, 90). Though in *Barratt* v. *Wyatt* (1862), 30 Beav. 442, ROMILLY, M.R., seems to have intimated that the court might, in the case of obvious failure of the operative part to carry out a specific recital, read the deed as amended in accordance with the recital. See, however, the principle enunciated by the same judge in *Young* v. *Smith*, *supra*.

(*l*) *Orr* v. *Mitchell*, [1893] A. C. 238, *per* Lord MACNAGHTEN, at p. 254.

(*m*) *Orr* v. *Mitchell*, *supra*.

(*n*) As in a mortgage deed the liability to pay interest (*Ashwell* v. *Staunton* (1861) 30 Beav. 52).

(*o*) Thus the grant of a reversion upon a lease is good, notwithstanding an error in the recital of the lease (*Withes* v. *Casson* (1615), Hob. 128); compare *Moody* v. *Lewen* (1593), Cro. Eliz. 127, where a grant following a misrecital of a fine was adjudged good, "for there is sufficient certainty of the thing granted, and of the intention of the parties to grant it." But an error in the recital of a lease may be important where it occurs in a grant of a new lease intended to take effect upon its determination (Co. Litt. 46 b; *Bath's* (*Bishop*) *Case* (1605), 6 Co. Rep. 34 b, 36 a; *Miller* v. *Manwaring* (1635), Cro. Car. 397); and if the misrecital is such that the new lease purports to be limited to take effect on the determination of a lease which is in fact non-existent, the new lease will commence at once, even though it thereby runs out before the existing lease (*Foote* v. *Berkly* (1668), 1 Lev. 234). If possible, however, the new lease will be read so as to avoid this result (see *Skinner* v. *Gray* (1595), note to *Mount* v. *Hodgkin* (1555), 2 Dyer, 116 a; *Foote* v. *Berkly*, *supra*). It has been held that a misrecital of a sum due under a lease—a rent of £170 instead of £140—in a collateral bond for payment of the sum cannot be corrected by reference to the lease itself (*Lainson* v. *Tremere* (1834), 1 Ad. & El. 792). See, as to a misrecital of title, *Moseley* v. *Motteux* (1842), 10 M. & W. 533; and as to erroneous recital of a draft will in an instrument purporting to carry out the intention of the draft, *Re Carter's Trusts* (1869), 3 I. R. Eq. 495.

(*p*) *Ingleby* v. *Swift* (1833), 10 Bing. 84, where the sum in the recital was £500 and in the operative part £1,000; the debt due at the time of action exceeded £500, and the question was whether the liability of the sureties could be restricted by the recital; *Samson* v. *Bell* (1809), 2 Camp. 39; compare *Australian Joint Stock Bank* v. *Bailey*, [1899] A. C. 396, P. C.; and see *Evans* v. *Earle* (1854), 10 Exch. 1.

(*q*) Where, in a marriage settlement, there was a recital of the settlor's intention to settle all his estate except the lands of "B." and its sub-denominations, and there was in the operative part a specific conveyance of

they extended by recitals that more was to pass (*r*). A covenant in a marriage settlement on the part of both spouses to settle after-acquired property of the wife will bind the wife, although according to the recitals it is the husband only who is to covenant (*s*). On the other hand, a covenant by the husband only will not be extended by the recital of an agreement for settlement of after-acquired property so as to be a covenant by the wife also (*t*).

Recitals explaining operative part.

**805.** The following are cases where the recitals assist the construction of the operative part:—Where there is an ambiguity in the operative part as to the property affected (*a*); where the operative part contains general words, and the recital shows that only specific property, comprised in the general words, was intended to pass (*b*); and where the recital shows that a limitation in point of time must be placed on the operative part (*c*).

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"K.," one of the sub-denominations of "B.," it was held that "K." passed (*Alexander* v. *Crosbie* (1835), L. & G. *temp.* Sugd. 145); compare *Ex parte Young* (1839), 4 Deac. 185 (recitals relating to joint property of partners did not control operative part which extended to separate property); *Ex parte Glyn* (1840), 1 Mont. D. & De G. 29 (recitals relating to freeholds subject to a charge did not prevent operative part affecting freeholds not so subject and copyholds); see also *Re Owen's Trust* (1855), 1 Jur. (N. S.) 1069, as to interests included in operative part of settlement, but not in recitals; *Youde* v. *Jones* (1844), 14 Sim. 131.

(*r*) *Macnamara* v. *Carey* (1867), 1 I. R. Eq. 9 (recital in settlement of agreement to settle five distinct denominations of land: two were omitted from operative part; these did not pass).

(*s*) *Willoughby* v. *Middleton* (1862), 2 John. & H. 344. So an absolute covenant not to do an act will not be qualified by a recital of an intention that it may be done on payment (see *Bird* v. *Lake* (1863), 1 Hem. & M. 111); and an absolute covenant for title will be enforced even as regards a defect appearing in a recital (*Page* v. *Midland Rail. Co.*, [1894] 1 Ch. 11); though a doubtful covenant may be explained by a recital (*Re Coghlan, Broughton* v. *Broughton*, [1894] 3 Ch. 76, where a covenant by a wife to settle property acquired during her life was restricted by the recital to property acquired during coverture).

(*t*) *Hammond* v. *Hammond* (1854), 19 Beav. 29; *Young* v. *Smith* (1865), 35 Beav. 87; *Re Webb's Trusts* (1877), 46 L. J. (CH.) 769; *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354, C. A. But if the husband covenants that he and his wife shall settle, and she executes the deed, the recital will justify the deed being read as containing a covenant by the wife (*Re De Ros' Trust, Hardwicke* v. *Wilmot* (1885), 31 Ch. D. 81).

(*a*) *Walsh* v. *Trevanion* (1850), 15 Q. B. 733.

(*b*) "Though words of specific description are not easily dealt with, yet general words are; and though general words may be in themselves large enough, yet if, upon the whole scope of the instrument, as to which special regard is to be had to what I call introductory recitals, it appears it was not the intention of the parties to pass these properties, it will not pass them" (*Howard* v. *Shrewsbury* (*Earl*) (1874), L. R. 17 Eq. 378, *per* JESSEL, M.R., at p. 391; *Moore* v. *Magrath* (1774), 1 Cowp. 9; *Doe* d. *Meyrick* v. *Meyrick* (1832), 2 Cr. & J. 223; *Rooke* v. *Kensington* (*Lord*) (1856), 2 K. & J. 753; *Hopkinson* v. *Lusk* (1865), 34 Beav. 215; *Re Durham* (*Earl*), *Grey* (*Earl*) v. *Durham* (*Earl*) (1887), 57 L. T. 164; see *Neame* v. *Moorsom* (1866), L. R. 3 Eq. 91, *per* Lord ROMILLY, M.R., at p. 97; *Orr* v. *Mitchell*, [1893] A. C. 238; *Jenner* v. *Jenner* (1866), L. R. 1 Eq. 361); and as to the interests comprised in a disentailing deed, see *Grattan* v. *Langdale* (1883), 11 L. R. Ir. 473.

(*c*) *Arlington* (*Lord*) v. *Merricke* (1672), 2 Wms. Saund. 411 (fidelity bond restricted to the original six months of office as appearing from a recital); so *Liverpool Waterworks Co.* v. *Atkinson* (1805), 6 East, 507; and as to recitals assisting the construction of covenants for title, see *Barton* v. *Fitzgerald* (1812), 15 East, 530, 541.

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After a recital that the assignor is entitled to a specific share of property under a will or settlement, an assignment of that specific share "or other the part or share, parts or shares" to which he is entitled will, if the rest of the instrument supports the recital, be restricted to the specific share (*d*). An apparent inaccuracy in a covenant may be corrected by restricting it in manner indicated by a recital (*e*); and the omission in the operative part of reference to a person who executes the deed may be supplied from a recital (*f*).

Releases and powers of attorney.

**806.** Releases are specially liable to have general words in the operative part controlled by the recitals. The general words in a release are limited always to those things which were specially in the contemplation of the parties at the time when the release was given (*g*); and since it is the office of recitals to state the particular considerations upon which a deed is founded, they naturally control the operation of the release (*h*). Thus, if in a release of debts there are recitals as to the specific debts to be released, the release will operate only as to these debts (*i*); and a release to an administrator, founded on a recital of specified assets having been got in, will not extend to other assets (*k*). Similarly, a power of attorney is liable to be restricted by the recitals. In a power of attorney, reciting the principal's intended absence abroad and his desire to appoint attorneys to act during his absence, the operative part, though unlimited, was held to be confined to the principal's absence (*l*). The above rule has been applied to indemnities and guarantees (*m*).

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(*d*) *Gray* v. *Limerick* (*Earl*) (1848), 2 De G. & Sm. 370; *Childers* v. *Eardley* (1860), 28 Beav. 648.

(*e*) *Re Neal's Trusts* (1857), 4 Jur. (N. S.) 6. Apparently a recital has more effect in controlling the language of a covenant than of a grant; see *Maclurcan* v. *Lane* (1858), 7 W. R. 135.

(*f*) *Dent* v. *Clayton* (1864), 33 L. J. (CH.) 503 (recital that wife, who executed the deed, joined to release dower, but the wife not mentioned in operative part as releasing).

(*g*) *London and South Western Rail. Co.* (*Directors etc.*) v. *Blackmore* (1870), L. R. 4 H. L. 610, *per* Lord WESTBURY, at p. 623. See also *Skilbeck* v. *Hilton* (1866), L. R. 2 Eq. 587.

(*h*) "If a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited, which was under the contemplation of the parties and intended to be released" (*Ramsden* v. *Hylton* (1751), 2 Ves. Sen. 304, *per* Lord HARDWICKE, L.C., at p. 310); see *Re Perkins, Poyser* v. *Beyfus*, [1898] 2 Ch. 182, C. A., *per* LINDLEY, M.R., at p. 190; *Lampon* v. *Corke* (1822), 5 B. & Ald. 606, *per* BEST, J., at p. 611; *Thorpe* v. *Thorpe* (1701), 1 Ld. Raym. 235, 662. So concurrence in a conveyance to obviate a specified objection as to title binds the concurring party only as regards that objection; *contra*, if he concurs to obviate objections generally (*Braybroke* (*Lord*) v. *Inskip* (1803), 8 Ves. 417; *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1817), 2 Mer. 171, 355).

(*i*) *Payler* v. *Homersham* (1815), 4 M. & S. 423. Similarly as to causes of action (*Simons* v. *Johnson* (1832), 3 B. & Ad. 175). Though in the absence of such recitals the general words will have effect (see *Lampon* v. *Corke*, *supra*, at p. 611).

(*k*) *Anon.* (1862), 31 Beav. 310; see *Lindo* v. *Lindo* (1839), 1 Beav. 496; *Turner* v. *Turner* (1880), 14 Ch. D. 829 (assets got in by the administrator after release not included in release); see *Major* v. *Salisbury* (1845), 14 L. J. (Q. B.) 118

(*l*) *Darby* v. *Coutts & Co.* (1885), 29 Ch. D. 500.

(*m*) As to indemnities, *Boyes* v. *Bluck* (1853), 13 C. B. 652; as to guarantees,

SUB-SECT. 2.—*Effect of Recital as a Covenant* (*n*). SECT. 5. Recitals.

**807.** For a covenant no technical language is needed, and any words in a deed which show an intention that the parties or one of them shall be bound to do or not to do a thing will constitute a covenant (*o*). Such an intention may appear from a recital, and then, in the absence of any contrary indication in the deed, the recital will operate as a covenant (*p*). This will be so where the recital is that one party has agreed to do or not to do a certain thing, as to pull down a mill and build a larger one (*q*); to settle property (*r*); to pay a composition on his own debts (*s*), or to pay the debts of another (*t*); not to enforce a debt till the security for it has been realised (*a*); in a separation deed, that the husband and wife have agreed to live apart (*b*); that one party shall have a certain share of profits (*c*); or where the recital is that a certain thing is intended to be done (*d*). And a recital or acknowledgment that a certain sum of money is due may be construed as a covenant to pay it (*e*). But for a recital to amount to a covenant it must be plain upon the whole deed that it was so intended (*f*). The court will be cautious in spelling a covenant out of a recital in a deed, because that is not the part of the deed in which covenants are usually expressed (*g*).

Where recital shows intention that party shall be bound.

**808.** A recital will not operate as a covenant if it appears on the whole instrument to have been introduced for some other purpose. Thus, where a recital that a debt is due is introductory to a charge for the debt given by the operative part, it will not amount to a covenant

Recital introduced for other purpose.

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*Pearsall* v. *Summersett* (1812), 4 Taunt. 593; *Bain* v. *Cooper* (1842) 9 M. & W. 701; but see *Sansom* v. *Bell* (1809), 2 Camp. 39.

(*n*) As to the effect of recitals as estoppels, see title ESTOPPEL; and as to the effect of a recital as an execution of a power, see title POWERS.

(*o*) See p. 476, *post*.

(*p*) *Aspdin* v. *Austin* (1844), 5 Q. B. 671, *per* Lord DENMAN, C.J., p. 683; see *Severn and Clerk's Case* (1588), 1 Leon. 122.

(*q*) *Sampson* v. *Easterby* (1829), 9 B. & C. 505; (1830) 6 Bing. 644, Ex. Ch.; here the construction was assisted by an express covenant to keep the new mill in repair.

(*r*) *Buckland* v. *Buckland*, [1900] 2 Ch. 534 (see p. 540); see *Graves* v. *White* (1680), Freem. (CH.) 57, and *Duckett* v. *Gordon* (1860), 11 I. Ch. R. 181, where, in a marriage settlement, it was recited that the wife's father desired to settle property.

(*s*) *Lay* v. *Mottram* (1865), 19 C. B. (N. S.) 479; *Brooks* v. *Jennings* (1866), L. R. 1 C. P. 476.

(*t*) *Saltoun* v. *Houston* (1824), 1 Bing. 433; *Carr* v. *Roberts* (1833), 5 B. & Ad. 78.

(*a*) *Farrall* v. *Hilditch* (1859), 5 C. B. (N. S.) 840.

(*b*) *Re Weston, Davies* v. *Tagart*, [1900] 2 Ch. 164.

(*c*) "One-third part of coals digged" (*Barfoot* v. *Freswell* (1675), 3 Keb. 465: "Were it but a recital, that before the indenture they were agreed, it is a covenant," *per* HALE, C.J.).

(*d*) *Hollis* v. *Carr* (1676), 2 Mod. Rep. 86.

(*e*) *Isaacson* v. *Harwood* (1868), 3 Ch. App. 225; *Brice* v. *Carre* (1661), 1 Lev. 47; *Saunders* v. *Milsome* (1866), L. R. 2 Eq. 573; *Jackson* v. *North Eastern Rail. Co.* (1877), 7 Ch. D. 573, 583; compare *Cheslyn* v. *Dalby* (1840), 4 Y. & C. (EX.) 238.

(*f*) *Borrowes* v. *Borrowes* (1872), 6 I. R. Eq. 368.

(*g*) *Farrall* v. *Hilditch*, *supra*, at p. 854.

SECT. 5. Recitals.

so as to make the debt a specialty debt (*h*). And, in accordance with the rules that the operative part prevails over the recitals (*i*), and that expressed terms exclude implied terms (*k*), a recital will not create a covenant where the operative part contains an express covenant dealing with the same subject-matter (*l*).

SECT. 6.—*Receipt Clauses.*

Receipt clause not conclusive.

Except in favour of purchaser for valuable consideration without notice.

**809.** A receipt for money, though contained in an instrument under seal, is not conclusive that the money has been in fact paid, and parol evidence can be given of the non-payment of the whole or part of it (*m*). Where, however, a purchaser—that term being used to include a lessee or mortgagee or other person who for valuable consideration takes or deals for any property (*n*)—derives title under a deed containing in its body, or having indorsed upon it, a receipt for consideration in money or otherwise, and has not notice that the consideration was not in fact paid or given, then in his favour the receipt is sufficient evidence of the payment or giving of the whole amount thereof (*o*).

Transferee of mortgage.

**810.** A transferee of a mortgage is, in the absence of any circumstances which should arouse suspicion, entitled to rely upon the mortgage money having been duly advanced in accordance with the receipt clause, and is not bound to get the mortgagor's admission of this fact by concurrence in the transfer or otherwise; though he

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(*h*) *Courtney* v. *Taylor* (1843), 6 Man. & G. 851, 868; *Iven* v. *Elwes* (1854), 3 Drew. 25; *Stone* v. *Van Heythuysen* (1854), Kay 721; *Marryat* v. *Marryat* (1860), 28 Beav. 224, 226; *Isaacson* v. *Harwood* (1868), 3 Ch. App. 225, 228; *Jackson* v. *North Eastern Rail. Co.* (1877), 7 Ch. D. 573. It seems that a recital of a debt will readily be assumed to be for some other purpose than to create a covenant, for it is easy to insert a covenant for payment if this is intended (*Courtney* v. *Taylor*, *supra*). A recital that consideration money has been paid, when in fact it has not been paid, does not imply a covenant to pay it (*Morgan's Patent Anchor Co.* v. *Morgan* (1876), 35 L. T. 811).

(*i*) See p. 459, *ante*.

(*k*) See p. 442, *ante*.

(*l*) *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354, C. A.; compare *Young* v. *Smith* (1865), L. R. 1 Eq. 180.

(*m*) A receipt in a deed—provided it was not merely indorsed on the deed and under hand (*Lampon* v. *Corke* (1822), 5 B. & Ald. 606, 612)—formerly operated at law to estop the person who had given it from saying that the money had not been paid (*Baker* v. *Dewey* (1823), 1 B. & C. 704, 707; see *Rowntree* v. *Jacob* (1809), 2 Taunt. 141, 143); but this was not so in equity (*Hawkins* v. *Gardiner* (1854), 2 Sm. & G. 441; *Wilson* v. *Keating* (1859), 27 Beav. 121, 126; see *Coppin* v. *Coppin* (1725), 2 P. Wms. 291, 295); and at law, too, the fact of non-payment might in some cases be proved, as where a cheque was dishonoured (*Deverell* v. *Whitmarsh* (1841), 5 Jur. 963); but not where the receipt was founded on a miscalculation (*Harding* v. *Ambler* (1838), 3 M. & W. 279). The receipt was not an estoppel where it was not an absolute acknowledgment of payment, but referred to and was qualified by a recital of an agreement to pay (*Bottrell* v. *Summers* (1828), 2 Y. & J. 407; *Lampon* v. *Corke*, *supra*); and since the Judicature Act, 1873 (36 & 37 Vict. c. 66), the rule in equity has prevailed. It follows that the unpaid purchase-money will be secured by the usual vendor's lien (*Winter* v. *Anson* (*Lord*) (1827), 3 Russ. 488).

(*n*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 2 (viii.).

(*o*) *Ibid.*, s. 55; see *Rimmer* v. *Webster*, [1902] 2 Ch. 163.

takes the risk of any change having taken place in the account since the date of the mortgage (*p*). But the circumstance that the deed is a transaction between a solicitor and his client may put a subsequent purchaser upon inquiry as to whether the purchase-money was in fact paid, and debar him from relying on the receipt (*q*); provided that the purchaser has actual or constructive notive of the existence of this relationship (*r*).

SECT. 6. Receipt Clauses.

## SECT. 7.—*The Property Conveyed.*

### SUB-SECT. 1.—*The Parcels (Rule of Falsa demonstratio)*

**811.** The property comprised in a deed—or the "parcels"—is described by terms having either a general or specific meaning, and usually by two or more of such terms. Where possible, full effect will be given to all the terms of description. Thus, a grant of all the grantor's freehold land in the county of Hampshire contains a general and also a specific term, and effect is given to both by treating the specific term as restricting the general term. Consequently, of all the grantor's freehold land only that situate in the county of Hampshire will pass (*s*). In such a case both the descriptions are required in order to define the particular property which is being dealt with.

Description of property.

Words of restriction.

But it may be that of the various terms used some are sufficient to define the property with certainty, and the rest add a description which is not true; if, for example, there is a grant of a specified house, with words sufficient to ascertain it with certainty, and then there is added "now in the occupation of A.," when the house is in fact in the occupation of B. In this case the additional words cannot be treated as words restricting the previous description. They are simply untrue, or, in the usual phrase, they constitute a *falsa demonstratio* (*t*). Since, however, the rest of the description

Words of false description.

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(*p*) *Bickerton* v. *Walker* (1885), 31 Ch. D. 151, C. A.

(*q*) *Gresley* v. *Mousley* (1862), 3 De G. F. & J. 433, C. A.; *Saunders* v. *Kent*, [1885] W. N. 147; *Powell* v. *Browne*, [1907] W. N. 228, C. A.

(*r*) *Bateman* v. *Hunt*, [1904] 2 K. B. 530, C. A.

(*s*) See *Miller* v. *Travers* (1832), 8 Bing. 244 (a case of a devise). Parcel or no parcel is a question for the jury, but it is the duty of the judge to explain to the jury what is the true meaning of any relevant documents (*Lyle* v. *Richards* (1866), L. R. 1 H. L. 222; *Kingsmill* v. *Millard* (1855), 11 Exch. 313). This meaning may be assisted by reference to the recitals (*Doe* d. *White* v. *Osborne* (1840), 4 Jur. 941; see p. 461, *ante*). Evidence outside the deed is admissible to identify the particular lands denoted by the words of the deed (*Dublin and Kingstown Rail. Co.* v. *Bradford* (1857), 7 I. C. L. R. 57; *Lyle* v. *Richards, supra*, p. 239). Words in an instrument of grant, as elsewhere, are to be taken in the sense which the common usage of mankind has applied to them in reference to the context in which they are found, and to the circumstances in which they are used (*Lord* v. *Sydney* (*City Commissioners*) (1859), 12 Moo. P. C. C. 473, 497); and they may be explained by subsequent possession (*Booth* v. *Ratté* (1890), 15 App. Cas. 188, 192, P. C.). The express mention of certain property—*e.g.*, "quarries"—may show that other property, such as "mines," was not intended to pass, on the principle *Expressio unius est exclusio alterius*, especially where assisted by the recitals (*Denison* v. *Holliday* (1857), 1 H. & N. 631). See *Francis* v. *Hayward* (1882), 22 Ch. D. 177, C. A. (fascia passing as part of a house).

(*t*) *Cowen* v. *Truefitt, Ltd.*, [1899] 2 Ch. 309, 311, C. A.: "The characteristic of cases within the rule is, that the description, so far as it is false, applies to no

SECT. 7. The Property Conveyed.

defines the property intended to be disposed of, and the deed must, if possible, be supported, the error is not allowed to prejudice the grant, and the erroneous addition is rejected.

The two rules of construction.

**812.** The latter result is expressed by the rule *Falsa demonstratio non nocet;* but this rule is subject to another rule, namely, that the additional words are not rejected as importing a false description, if they can be read as words of restriction (*a*). These two rules govern the construction of parcels. When the premises are sufficiently described, as by giving the particular name of a close, or otherwise, an erroneous additional description will be rejected as a "false demonstration"; but if there is not this certainty in the first description—as if it is expressed in general terms—and a particular description is added, the latter controls the former and limits the generality of the earlier description (*b*). In case of doubt whether words are a false demonstration or words of restriction they must be taken as words of restriction, for the law will not assume that the description is erroneous or false (*c*) Of course the additional words may be neither words of restriction nor of false description, but simply an alternative description which exactly fits the premises already described (*d*). Here the further description is redundant.

Descriptions rejected.

**813.** It follows from the first rule that, where the particular land is ascertained with certainty by part of the description, an erroneous statement as to the mode in which title to the land is derived (*e*),

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subject at all, and, so far as it is true, applies to one only" (*per* LINDLEY, M.R., quoting from Jarman on Wills, 5th ed., p. 742).

(*a*) *Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram* (*Morrell* v. *Fisher* (1849), 4 Exch. 591, 604).

(*b*) *Doe* d. *Smith* v. *Galloway* (1833), 5 B. & Ad. 43 (see *per* PARKE, J., at p. 51); see Shep. Touch. p. 247: "Whenever there is in the first place a sufficient certainty and demonstration, and afterwards an accumlative description, and it fails in point of accuracy, it will be rejected"; *Webber* v. *Stanley* (1864), 16 C. B. (N. S.), 698, *per* ERLE, C.J., at p. 752; see *Roe* d. *Conolly* v. *Vernon* (1804), 5 East, 51 (on a will). As to words of restriction it may be observed that, usually, they simply restrict previous general words, as where "all my lands"—a general description—is restricted by the words "in the occupation of C." The latter words cut off from "all my lands," the part in C.'s occupation, and this alone passes. Or the descriptions may be mutually restrictive, as where I grant all my lands in Hampshire in the occupation of C., and I have lands elsewhere also in C.'s occupation. Here the two descriptions "all my lands in Hampshire" and "all my lands in C.'s occupation" are mutually restrictive, the parcels actually intended cutting off a portion from each class. Both these cases are covered by the *dictum*, "If there is some land wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation, to pass only those lands wherein the circumstances are true" (*Morrell* v. *Fisher* (1849), 4 Exch., 591, *per* ALDERSON, B., at p. 604).

(*c*) Bacon's Law Tracts, Maxims of the Law, 13; *Doe* d. *Harris* v. *Greathed* (1806), 8 East, 91, 104; *Morrell* v. *Fisher, supra;* see *Doddington's Case* (1594), 2 Co. Rep. 32 b, 33 a, n. (A).

(*d*) *E.g.*, "No. 73, Oxford Street, now in the occupation of John Smith," where such is the actual occupation.

(*e*) "'All my manor of Sale in Dale which I had by descent.' I had it by purchase and not by descent, yet the manor, being sufficiently described, passes; but *contra* if the first description is not specific, as 'all my lands in Dale which I had by descent'" (Shep. Touch. 247; *Wrotesley* v. *Adams* (1559), 1 Plowd. 187, p. 191; *Windham* v. *Windham* (1581), 3 Dyer, 376 b); and the rest of the

or as to tenure (*f*), or as to area (*g*), or as to mode of user (*h*), or as to name (*i*), or as to the parish (*k*), or as to boundary (*l*), or as to occupation (*m*), will be rejected. And the description which is rejected as false need not follow the true description. The whole description must be looked at fairly to see which are the leading words of description and which is the subordinate matter (*n*).

Map.

A map attached to or indorsed on a deed, and referred to in the deed, ought to be looked at for the purpose of explaining the language of the parcels (*o*); but a complete and unambiguous description in the deed will prevail over the map (*p*).

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instrument may show that the words as to title are restrictive (*Clay and Barnet's Case* (1613), Godb. 236).

(*f*) Devise of "my freehold farm and lands situate at Edgware, and now in the occupation of James Bray," held to pass a part of the farm which was copyhold (*Re Bright-Smith, Bright-Smith* v. *Bright-Smith* (1886), 31 Ch. D. 314).

(*g*) Where a piece of land was described by reference to a plan drawn to scale, and was stated to contain 34 perches, whereas the plan showed it to contain 27 perches only, the description "34 perches" was rejected (*Llewellyn* v. *Jersey (Earl)* (1843), 11 M. & W. 183; Shep. Touch. p. 247; *Willoughby (Lord)* v. *Foster* (1553), 1 Dyer, 80 b; *Jack* v. *M'Intyre* (1845), 12 Cl. & Fin. 151, H. L.; *Manning* v. *Fitzgerald* (1859), 29 L. J. (EX.) 24). Where a farm sufficiently described was stated to contain 213 acres, certain woodlands, 56 acres in extent, part of the farm, but not included in the 213 acres, were held to pass (*Portman* v. *Mill* (1839), 8 L. J. (CH.) 161); and see *Barnard* v. *De Charleroy* (1899), 81 L. T. 497, P. C., that the extent of premises described by name depends more on local evidence than on measurement; compare *Jervey* v. *Styring* (1874), 29 L. T. 847. But where the dimensions are an essential part of the description, and not a mere addition to a description which is in the first place sufficiently certain, they cannot be rejected (*Mellor* v. *Walmesley*, [1905] 2 Ch. 164, C. A., *per* VAUGHAN WILLIAMS, L.J., p. 175).

(*h*) Devise of freehold hereditaments called West Cliff, situate at West Cowes, "now used as lodging-houses"; the whole of the West Cliff estate passed, though only part was used as lodging-houses (*Cunningham* v. *Butler* (1861), 3 Giff. 37).

(*i*) *Rorke* v. *Errington* (1859), 7 H. L. Cas. 617, 626.

(*k*) *Lambe* v. *Reaston* (1813), 5 Taunt. 207; compare *Cotterel* v. *Franklin* (1815), 6 Taunt. 284; *contra, Norris's Case* (1570), 3 Dyer, 292 a.

(*l*) *Francis* v. *Hayward* (1882), 22 Ch. D. 177, C. A., *per* JESSEL, M.R., at p. 181.

(*m*) A demise by lessors of the reversion of all their "farm in Brosley, in the tenure of Roger Wilcox," passed the farm though not in such tenure (*Wrotesley* v. *Adams* (1559), 1 Plowd. 187, 191; *Swyft* v. *Eyres* (1639), Cro. Car. 546; *Goodtitle* d. *Radford* v. *Southern* (1813), 1 M. & S. 299; *Wilkinson* v. *Malin* (1832), 2 Cr. & J. 636; *Doe* d. *Smith* v. *Galloway* (1833), 5 B. & Ad. 43 (lease of land within specified abuttals "now in the occupation of" S.; and see *Hardwick* v. *Hardwick* (1873), L. R. 16 Eq. 168 (a devise), where both the situation and occupation were inaccurately described, but the estate, being clearly identified, passed). A reference to occupation will not necessarily limit the premises conveyed, although it is true of only a part of the premises (*Martyr* v. *Lawrence* (1864), 2 De G. J. & Sm. 261, 270).

(*n*) *Hardwick* v. *Hardwick, supra, per* Lord SELBORNE, L.C., at p. 175; *Re Bright-Smith, Bright-Smith* v. *Bright-Smith, supra; Cowen* v. *Truefitt, Ltd.*, [1899] 2 Ch. 309, C. A. Formerly the earlier words prevailed, and if they were false the grant was void (*Dowtie's Case* (1584), 3 Co. Rep. 9 b; see *Stukeley* v. *Butler* (1615), Hob. 168, 171).

(*o*) *Taylor* v. *Parry* (1840), 1 Man. & G. 604, 616; *Lyle* v. *Richards* (1866), L. R. 1 H. L. 222, 231; compare *Re Otway's Estate* (1862), 13 I. Ch. R. 222, 234; *contra*, if the map, though attached, is not referred to in the deed (*Wyse* v. *Leahy* (1875), 9 I. R. C. L. 384). A plan on particulars of sale which are referred to in the deed can probably not be looked at (*Barlow* v. *Rhodes* (1833), 1 Cr. & M. 439).

(*p*) *Dublin and Kingstown Rail. Co.* v. *Bradford* (1857), 7 I. C. L. R. 57; *Roe*

SECT. 7. The Property Conveyed.

Restrictive words.

**814.** Where the principal words of the description lack the certainty necessary for the rejection of the subordinate description as a *falsa demonstratio*, and this subordinate description can be read as limiting the principal description, it will be construed accordingly (*q*). This, for example, is done when the first part of the description is expressed in general terms, and the second part is suitable for defining a particular property included in the general terms (*r*); and in such a case words describing the occupation of the premises will be construed as words of restriction (*s*). And though the principal description is in form specific, yet, if it does not contain the requisite certainty, it will be restricted by a reference to the occupation (*t*), or to the situation (*u*). Where words of description in the body of a deed refer to a schedule as more particularly describing the property conveyed, the schedule will in general be construed as limiting the description in the deed, and only the premises mentioned in the schedule will pass (*a*). But a thing mentioned in the schedule, to which there has been no reference in the body of the deed, will not pass (*b*).

Presumption that soil passes *ad medium filum viæ*.

**815.** Where a conveyance of land describes the land as bounded by a public road or a river, the conveyance will be construed as

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v. *Lidwell* (1860), 11 I. C. L. R. 320, Ex. Ch.; *Horne* v. *Struben*, [1902] A. C. 454, 458, P. C.; this will be so although the words of the deed are general, if sufficiently definite (*Willis* v. *Watney* (1881), 51 L. J. (CH.) 187).

(*q*) See *Slingsby* v. *Grainger* (1859), 7 H. L. Cas. 273, *per* Lord CHELMSFORD, L.C., at p. 283.

(*r*) In a Crown grant of lands in the city of Wells in the occupation of J. B., the words "in the city of Wells" were restrictive, and lands elsewhere did not pass, although in the occupation of J. B. (*Doddington's Case* (1594), 2 Co. Rep. 32 b, 33 a; see *Hall* v. *Combes* (1595), Cro. Eliz. 368); a devise of freehold estates in the county of Limerick and in the city of Limerick did not pass estates in the county of Clare (*Miller* v. *Travers* (1832), 8 Bing. 244); see *Doe* d. *Harris* v. *Greathed* (1806), 8 East, 91; *Evans* v. *Angell* (1858), 26 Beav. 202; but a specific enumeration does not necessarily cut down the effect of previous general words (*Stukeley* v. *Butler* (1615), Hob. 168).

(*s*) *Doe* d. *Parkin* v. *Parkin* (1814), 5 Taunt. 321 (on a will); *Bartlett* v. *Wright* (1593), Cro. Eliz. 299 (on a deed); *Ognel's Case* (1587) 4 Co. Rep. 48 b (see p. 50 a); *Homer* v. *Homer* (1878), 8 Ch. D. 758, C. A. (on a will).

(*t*) *Morrell* v. *Fisher* (1849), 4 Exch. 591 (devise by a testator of all his "leasehold farmhouse, homestead, lands and tenements, at Headington, containing about 170 acres, held under Magdalen College, Oxford, and now in the occupation of B.," did not pass land at Headington held by the testator under the college, but not in the occupation of B.); see *Dyne* v. *Nutley* (1853), 14 C. B. 122; *Magee* v. *Lavell* (1874), L. R. 9 C. P. 107 (agreement); *Re Seal, Seal* v. *Taylor*, [1894] 1 Ch. 316 (will).

(*u*) *Webber* v. *Stanley* (1864), 16 C. B. (N. S.) 698 (devise of lands referred to as the Tedworth estate, in Hants, was restricted to the part of the estate in that county, though another part was in Wilts); *Pedley* v. *Dodds* (1866), L. R. 2 Eq. 819; and compare *Gibson* v. *Clark* (1819), 1 Jac. & W. 159, as to premises being restricted by reference to a "vill."

(*a*) *Griffiths* v. *Penson* (1863), 9 Jur. (N. S.) 385; *Barton* v. *Dawes* (1850), 10 C. B. 261. As to bills of sale previous to the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), see *Wood* v. *Rowcliffe* (1851), 6 Exch. 407; *Re Craig* (1869), 4 I. R. Eq. 158, where the schedule was construed as restrictive; *contra*, *Baker* v. *Richardson* (1858), 6 W. R. 663. General words carrying effects incident to articles specified in the schedule have their due effect (*Cort* v. *Sagar* (1858), 3 H. & N. 370).

(*b*) *Re McManus, Ex parte Jardine* (1875) 10 Ch. App. 322.

passing half the road or half the bed of the river; that is, from the edge of the land to the middle of the road—*ad medium filum viæ*—or to the middle of the river, unless there is enough in the circumstances, or in the language of the instrument, to show that that is not the intention of the parties (*c*).

SUB-SECT. 2.—*General Words of Description.*

General words taken in ordinary sense, or restricted by rule of *ejusdem generis*.

**816.** Where, in the description of property comprised in a conveyance, general words follow an enumeration of specific things or classes of things, then *primâ facie* the general words must be taken in their ordinary meaning, and will receive the extensive construction which such ordinary meaning requires. But, while this is the usual rule, there may be indications in the language of the instrument that the general words are to have a more limited meaning, and then they will be construed so as to include only things *ejusdem generis* with those which have been specifically mentioned before (*d*).

Where *ejusdem generis* rule applies.

**817.** Where the particular things named have some common characteristic which constitutes them a genus, and the general words can be properly regarded as in the nature of a sweeping clause designed to guard against accidental omissions, then the rule of *ejusdem generis* will apply, and the general words will be restricted to things of the same nature as those which have been already

(*c*) *Micklethwait* v. *Newlay Bridge Co.* (1886), 33 Ch. D. 133, C. A.; see the rule stated by COTTON, L.J., p. 145; *Simpson* v. *Dendy* (1860), 8 C. B. (N. S.) 433, 472; *Berridge* v. *Ward* (1861), 10 C. B. (N. S.) 400; *Crossley & Sons, Ltd.* v. *Lightowler* (1866), L. R. 3 Eq. 274, 295. The rule applies to a lease (*Haynes* v. *King*, [1893] 3 Ch. 439, 448), and to a Crown grant (*Lord* v. *Sydney (City Commissioners)* (1859), 12 Moo. P. C. C. 473), but not in the case of an inclosure award allotting waste lands of a manor bordering on a river, so as to give half the bed of the river with the plots allotted (*Ecroyd* v. *Coulthard* [1897] 2 Ch. 554; [1898] 2 Ch. 358, C. A.; compare *Hindson* v. *Ashby*, [1896] 2 Ch. 1, C. A., at pp. 6, 9). As to the presumption that the soil of a stream belongs in moieties to the landowners on either side, see *Wishart* v. *Wyllie* (1853), 1 Macq. 389, H. L. The presumption in the case of a road applies to a private road (*Holmes* v. *Bellingham* (1859), 7 C. B. (N. S.) 329, 336; *Smith* v. *Howden* (1863), 14 C. B. (N. S.) 398). But apparently it does not extend to an inland lake (*Bloomfield* v. *Johnston* (1868), 8 I. R. C. L. 68, Ex. Ch., at pp. 89, 95, 97). See further, on this subject, titles HIGHWAYS, STREETS AND BRIDGES; SALE OF LAND; WATERS AND WATERCOURSES.

(*d*) *Anderson* v. *Anderson*, [1895] 1 Q. B. 749, C. A., *per* Lord ESHER, M.R., at p. 753; *Parker* v. *Marchant* (1842), 1 Y. & C. Ch. Cas. 290, 300 (on a will). In *Pope* v. *Whitcombe* (1827), 3 Russ. 124, a creditor's deed assigning furniture, stock-in-trade, debts, and securities for money, and "all other the estate and effects" of the assignor, was held not to pass a contingent interest in a testatrix's residuary estate; and, similarly, in *Re Wright's Trusts* (1852), 15 Beav. 367; but these decisions would not now be followed (*Ivison* v. *Gassiot* (1853), 3 De G. M. & G. 958). In the last case the specific exception of wearing apparel assisted the general words, and indicated that everything else was to pass; but, apart from this, there is nothing in particular words of this nature to indicate a specific genus and so cut down the general words; moreover, the object of such a deed is to pass everything of value (*Ringer* v. *Cann* (1838), 3 M. & W. 343; *Doe* d. *Farmer* v. *Howe* (1840), 9 L. J. (Q. B.) 352). But the recitals may show that general words are to be restricted (*Hopkinson* v. *Lusk* (1865), 34 Beav. 215; see p. 461, *ante*). As to construction of powers of attorney so as to limit them to the specified objects, see *Harper* v. *Godsell* (1870), L. R. 5 Q. B. 422; *Jacobs* v. *Morris*, [1902] 1 Ch. 816, C. A.; and see p. 462, *ante*.

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mentioned (*e*). This construction will be assisted if the general scope or language of the deed, or the particular clause, indicates that the general words should receive a limited construction (*f*), or if an unlimited construction will produce some unforeseen loss to the grantor (*g*).

SUB-SECT. 3.—*General Words conveying Appurtenances, and conveying or creating Easements.*

Use of general words.

**818.** In addition to general words of description which either supply defects in the enumeration of things of a specific class—in accordance with the rule of *ejusdem generis*—or add other land or things not included in the previous enumeration, there may be general words intended to bring in various rights incidental to the enjoyment of the property conveyed, but their use for the latter purpose has been in most cases rendered unnecessary by statute (*h*).

Rights appendant or appurtenant.

In regard to many rights incident to the enjoyment of land, the use of general words was always unnecessary, since the mere grant of the property described in the parcels carried the rights as a matter of course, unless expressly excepted (*i*).

SUB-SECT. 4.—*Exceptions and Reservations.*

Definitions.

**819.** An exception is always of part of the thing granted, and only a thing *in esse* can be excepted; a reservation is of a thing

(*e*) *Lambourn* v. *McLellan*, [1903] 2 Ch. 268, C. A.; *Moore* v. *Magrath* (1774), 1 Cowp. 9, *per* Lord MANSFIELD, C.J., at p. 12. Such cases have given rise to the common enunciation of the *ejusdem generis* rule as the rule to be *primâ facie* applied "where a particular class is spoken of, and general words follow" (*Lyndon* v. *Standbridge* (1857), 2 H. & N. 45, *per* POLLOCK, C.B., at p. 51; *Clifford* v. *Arundell* (1860), 1 De G. F. & J. 307, *per* Lord CAMPBELL, L.C., at p. 311; *Harrison* v. *Blackburn* (1864), 17 C. B. (N.S.) 678, *per* ERLE, C.J., at p. 690; see *Johnson* v. *Edgware etc. Rail. Co.* (1866), 35 Beav. 480, where in a power to resume possession of any part of demised land "for the purpose of building, planting, accommodation, or otherwise," "otherwise" was read *ejusdem generis*, and did not authorise the resumption of land required by a railway company. But if the particular words exhaust a whole genus, the general words must refer to some larger genus (*Fenwick* v. *Schmalz* (1868), L. R. 3 C. P. 313, *per* WILLES, J., at p. 315).

(*f*) Where, for instance, in a covenant to yield up fixtures at the end of a term, the fixtures particularly enumerated are all "landlord's fixtures," the general words will be restricted to the same class (*Lambourn* v. *McLellan*, *supra*). Where an annuity is charged on "rents or profits or any other moneys" in the hands of the trustees, the frame of the deed may readily show that "other moneys" are to be restricted to moneys in the nature of income (*Clifford* v. *Arundell*, *supra*); where a specific description of leasehold property is followed by general words referring to leaseholds only, freehold property will not pass (*Doungsworth* v. *Blair* (1837), 1 Keen, 795).

(*g*) If, for example, it will lead to a forfeiture of the property which it is contended is included in the general words (*Re Waley's Trusts* (1855), 3 Drew. 165).

(*h*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6.

(*i*) This was expressed by the maxim *Cuicunque aliquid conceditur, conceditur etiam id sine quo res ipsa non esse potuit.* "When anything is granted, all the means to attain it, and all the fruits and effects of it are granted also; and shall pass inclusive, together with the thing, by the grant of the thing itself, without the words '*cum pertinentiis*,' or other like words" (Shep. Touch. 89; *Cardigan* (*Earl*) v. *Armitage* (1823), 2 B. & C. 197, p. 207; *Rowbotham* v. *Wilson* (1860), 8 H. L. Cas. 348, p. 360; *Ramsay* v. *Blair* (1876), 1 App. Cas. 701, p. 703). See also titles COMMONS, Vol. IV., p. 448; EASEMENTS AND PROFITS À PRENDRE; SALE OF LAND.

not *in esse*, but newly created or reserved out of land or a tenement upon a grant thereof (*k*).

Thus, upon the grant of land there may be an exception of a specified part, and then this is not included in the grant at all (*l*), and where the amount to be excepted is specified, but not its position, the uncertainty can be determined by election (*m*). The rule for construing exceptions is that what will pass by words in a grant will be excepted by the same or like words in an exception (*n*). And trees or minerals may be excepted (*o*). An exception of trees is held not to extend to fruit trees (*p*), but it carries so much of the soil as is necessary for the growth of the trees (*q*). An exception of "mines," or of any mineral occupying a continuous space, is an exception also of the space occupied (*r*); but a reservation of a right to get minerals does not operate as an exception of the minerals themselves, unless an intention to that effect is clearly shown (*s*). An exception of trees (*t*) or of minerals (*u*) carries with it the right to do all things necessary (*a*) for getting and disposing of them. A reservation may in substance be an exception, as where there is a reservation of part of the thing granted (*b*); but the reservation will be void if it is repugnant to the grant, as a reservation of part of the profits of what is granted (*c*).

Strictly the term "reservation" implies a right of the nature of rent reserved to a landlord or lord of a manor; thus rent, heriots, suit of mill, and suit of court are reservations, and have been

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(*k*) Co. Litt. 47 a; Shep. Touch. 80.

(*l*) *Doe* d. *Douglas* v. *Lock* (1835), 2 Ad. & El. 735, 744.

(*m*) *Jenkins* v. *Green* (No. 1) (1858), 27 Beav. 437; and see p. 457, *ante*.

(*n*) Shep. Touch. 100. But if the exception covers the whole of anything specifically granted—as an exception of "shops" out of a grant of a messuage "with all the chambers, cellars, and shops"—it is repugnant and therefore void: *Horneby* v. *Clifton* (1567), 3 Dyer, 264 b; *Cochrane* v. *M'Cleary* (1869), 4 I. R. C. L. 165, Ex. Ch.; see *Cooper* v. *Stuart* (1889), 14 App. Cas. 286, P. C., at p. 289. As to construing an exception in favour of the grantee, see p. 441, *ante*.

(*o*) *Cardigan* (*Earl*) v. *Armitage* (1823), 2 B. & C. 197, 207.

(*p*) *Wyndham* v. *Way* (1812), 4 Taunt. 316, at p. 318, n. (a); see *London* v. *Southwell* (*Collegiate Church*) (1618), Hob. 303; *Bullen* v. *Denning* (1826), 5 B. & C. 842.

(*q*) *Ive's Case* (1597), 5 Co. Rep. 11 a; Cro. Eliz. 521; *Liford's Case* (1614), 11 Co. Rep. 46 b. An exception of "all wood and underwood" perhaps carries the exception of soil further: *Legh* v. *Heald* (1830), 1 B. & Ad. 622, 626.

(*r*) *Proud* v. *Bates* (1865), 34 L. J. (CH.) 406; *Hamilton* (*Duke*) v. *Graham* (1871), L. R. 2 Sc. & Div. 166.

(*s*) *Sutherland* (*Duke*) v. *Heathcote*, [1892] 1 Ch. 475, 483, C. A.; compare *Hamilton* (*Duke*) v. *Dunlop* (1885), 10 App. Cas. 813. And as to exceptions of minerals, see title MINES, MINERALS AND QUARRIES.

(*t*) Shep. Touch. 100; *Liford's Case*, *supra*, at p. 52 a; *Hewitt* v. *Isham* (1851), 7 Exch. 77.

(*u*) *Cardigan* (*Earl*) v. *Armitage*, *supra*; *Dand* v. *Kingscote* (1840), 6 M. & W. 174, 196; *Rowbotham* v. *Wilson* (1860), 8 H. L. Cas. 348, 360; *Ramsay* v. *Blair* (1876), 1 App. Cas. 701, 703.

(*a*) Consequently rights which are merely convenient for, but not necessarily incident to, the getting of the thing excepted are not implied by the exception (*Darcy* (*Lord*) v. *Askwith* (1618), Hob. 234; *Cardigan* (*Earl*) v. *Armitage*, *supra*, at p. 211).

(*b*) Co. Litt. 143 a; *Anon.* (1536), 1 Dyer, 19 a, pl. 110; *Fancy* v. *Scott* (1828), 2 Man. & Ry. (K. B.) 335; see *Doe* d. *Douglas* v. *Lock*, *supra*, at p. 745.

(*c*) Co. Litt. 142 a.

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described as the only things which, according to the legal meaning of the word, are reservations (*d*). It is essential to a reservation that it should issue out of the thing granted (*e*). But the term is frequently used to denote some incorporeal right over the thing granted of which the grantor intends to have the benefit, such as a right of sporting or fishing (*f*) or a right of way (*g*). In this case the reservation operates as a regrant of the right of the grantee to the grantor, and it is not effectual unless the deed in which it is contained is executed by the grantee (*h*); and if the deed is so executed, then the regrant may operate in favour of a person who is not a party to the deed (*i*).

SUB-SECT. 5.—"*All Estate*" *Clause.*

Effect of "all estate" clause.

**820.** It was formerly usual to add to the parcels general words, known as the "all estate" clause; expressing that the grantor conveyed all his "estate, interest, right, title (*j*), claim (*k*), and demand" in, to, or upon the property conveyed. Now every conveyance of property made after 31st December, 1881, passes all the estate, right, title, interest, claim, and demand which the conveying parties have, or have power to convey, in the property. But this rule applies only so far as a contrary intention is not expressed in the conveyance, and it is subject to the terms and provisions of the conveyance (*l*).

The ordinary effect of a conveyance containing these general words, or operating under the above statutory rule, is to convey every estate or interest vested in the grantor, although not vested in him in the character in which he became a party to the conveyance (*m*). And if he purports to convey the fee simple,

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(*d*) *Doe* d. *Douglas* v. *Lock* (1835), 2 Ad. & El. 735, 743.

(*e*) *Durham and Sunderland Rail. Co.* v. *Walker* (1842), 2 Q. B. 940, 967, Ex. Ch.

(*f*) *Doe* d. *Douglas* v. *Lock, supra*; *Wickham* v. *Hawker* (1840), 7 M. & W. 63.

(*g*) *Durham and Sunderland Rail. Co.* v. *Walker, supra.*

(*h*) *Doe* d. *Douglas* v. *Lock, supra*; *Durham and Sunderland Rail. Co.* v. *Walker, supra*; see *Thellusson* v. *Liddard*, [1900] 2 Ch. 635, at p. 645.

(*i*) *Wickham* v. *Hawker, supra.*

(*j*) As to the distinction between these words, see Co. Litt. 345 a. "Estates" are the interests created in land by legal and equitable limitations; "right" is properly where an estate is turned to a right of entry, as by disseisin; "title" is either a lawful cause of entry to defeat an existing estate, as title of condition, or, more generally, it includes "right"; "interest" is the widest term, and includes estates, rights, and titles. As to the various rights or *jura* which make up ownership, and which passed in old times under *totum jus*, see *Altham's Case* (1610), 8 Co. Rep. 150 b, 151 b. For a case where a moiety was cut down to a fifth part on the general intention of the deed, see *Grieveson* v. *Kirsopp* (1842), 9 Beav. 283.

(*k*) "Claim" will cover a contingent interest, notwithstanding that it would properly be called a possibility (*Wright* v. *Wright* (1750), 1 Ves. Sen. 409).

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 63.

(*m*) *Drew* v. *Norbury* (*Earl*) (1846), 3 Jo. & Lat. 267, *per* Lord ST. LEONARDS, L.C., at p. 284; *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231, C. A., *per* STIRLING, L.J., at p. 256; Co. Litt. 345 a; Shep. Touch. 98; *Johnson* v. *Webster* (1854), 4 De G. M. & G. 474, 488. Thus, a conveyance will carry both the fee and a term of years vested in the grantor, but not merged (*Burton* v. *Barclay* (1831), 7 Bing. 745, 761.)

but has in fact only an equitable title to a term, such title will pass (*n*).

But the words of the estate clause or of the statutory rule, being general words, are subject to the same elasticity of construction as general words in the parcels. They are liable to be controlled by recitals (*o*), by the scope of the deed read as a whole, and by the surrounding circumstances (*p*). And a disentailing deed will be restricted to the estate tail which appears to be intended to be barred, and will not extend to another contingent estate tail (*a*).

## SECT. 8.—*The Habendum.*

Office of the premises and of the habendum.

**821.** The parts of a deed before the habendum are called the premises of the deed. Their office is to name the grantor and grantee, and to define the thing which is granted. In addition, the circumstances preliminary to and leading up to the transaction are stated in the recitals. The office of the habendum is to limit the estate granted, and in doing this the grantee is mentioned again (*b*). The omission to insert in the premises and the habendum respectively their proper contents leads to various kinds of repugnancy or uncertainty in the deed, and as to these the following rules have been established.

Omission of habendum.

**822.** It is permissible to omit the habendum altogether, and if the premises, in addition to defining the grantor, the grantee, and the parcels, define also the estate to be taken by the grantee the deed is effectual (*c*).

Grantee different in premises and habendum.

**823.** Although the premises ought to contain the name of the grantee, yet, if the name is omitted there, it is sufficient that it is mentioned in the habendum (*d*). If, however, a grantee is named in the premises, and the habendum is to him and another, then only the grantee named in the premises can take an immediate estate (*e*), though the other may take by way of remainder if the

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(*n*) *Thellusson* v. *Liddard*, [1900] 2 Ch. 635. But a leasehold interest will not pass under a deed intended to pass a freehold interest, notwithstanding that the deed thus becomes inoperative (*Goodwin* v. *Noble* (1857), 8 E. & B. 587).

(*o*) See p. 459, *ante*.

(*p*) *Williams* v. *Pinckney* (1897), 67 L. J. (CH.) 34, 39, C. A.; *Re Cooke and Bletcher's Contract* (1895), 13 R. 264. Thus it may appear that a reversion was not intended to pass (*Mullineux* v. *Ellison* (1863), 8 L. T. 236). On the other hand, an interest omitted by mistake in the recitals, and in the express operative part, may pass under the general words (*Knapping* v. *Tomlinson* (1870), 18 W. R. 684).

(*a*) *Grattan* v. *Langdale* (1883), 11 L. R. Ir. 473, 488. See, further, title SALE OF LAND.

(*b*) *Buckler's Case* (1597), 2 Co. Rep. 55 a; *Throckmerton* v. *Tracy* (1555), 1 Plowd. 145, 152; Co. Litt. 6 a; Shep. Touch. 74.

(*c*) *Goodtitle* v. *Gibbs* (1826), 5 B. & C. 709, 717; Shep. Touch. 75; *Kerr* v. *Kerr* (1854), 4 I. Ch. R. 493, 497.

(*d*) *Spyve* v. *Topham* (1802), 3 East, 115; Co. Litt. 7 a; Shep. Touch. 75; allowed as to leases in *Butler* v. *Dodton* (1579), Cary, 123; *Eeles* v. *Lambert* (1648), Aleyn, 38, 41. The contrary opinion in *Bustard* v. *Coulter* (1602), Cro. Eliz. 902, has not been accepted, and in that case the omission of the grantee in the premises was held to be cured by the pleadings (*ibid.*, p. 917).

(*e*) *Sammes's Case* (1609), 13 Co. Rep. 54; *Kirkman and Reignold's Case* (1588), 2

SECT. 8. The Habendum.

limitation in the habendum can be construed as giving him such an estate (*f*). If the grant in the premises is to A., habendum to B., the effect is similar; A. takes an immediate estate and the habendum is void (*g*), unless it gives to B. an estate in remainder after A.'s estate (*f*).

Effect of specifying parcels in habendum.

**824.** It has been laid down that the parcels must be defined in the premises, and that the mention of lands in the habendum, which have not been expressly or impliedly mentioned in the premises, is of no effect (*h*); but any such rule is subject to the general principle that the deed must be construed as a whole, and it is believed that at the present day the mention of lands in the habendum instead of in the premises would not invalidate the grant (*i*). Where the parcels have been defined in the premises, it is wrong to repeat them specifically in the habendum, unless for the purpose of expressing different limitations as to different parcels (*k*).

Effect of limitation in premises.

**825.** In the premises the grant should be to the grantee simply without words of limitation, and the estate should be limited only in the habendum. If there is a simple grant to the grantee in the premises and no habendum at all, then the grantee would by implication take an estate for life; but if the habendum contains the limitation of the estate, this excludes any implication of an estate for life in the premises, and the grantee takes the estate limited in the habendum (*l*); or if the estate so limited is contrary to the rules of law, the deed is void (*m*).

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Leon. 1. This rule does not affect the limitation of the use, which in such a case might be to A. and B. (*Sammes's Case, supra*).

(*f*) Co. Litt. 231 a. A lease to A., habendum to A., B., and C. in succession is void for the uncertainty as to who shall begin; but if the habendum is to A., B., and C. in the order in which they are written, this is good, and they take in succession (*Windsmore* v. *Hobart* (1585), Hob. 313; *Grubham's Case* (1613), 4 Leon. 246); and similarly in the case of a grant to A., habendum to A. and his wife for their lives in succession (*Wheadon* v. *Sugg* (1615), Cro. Jac. 372; compare *Greenwood* v. *Tyber* (1620), Cro. Jac. 563; and see *Cochin* v. *Heathcote* (1773), Lofft, 190).

(*g*) See *Anon.* (1573), 3 Leon. 32.

(*h*) "Nothing shall pass in the habendum if it be not spoken of in the grant, except it be a thing appendant or appurtenant" (*Sion's* (*Abbess*) *Case* (1460), cited in *Throckmerton* v. *Tracy* (1555), 1 Plowd. 145, at p. 152; Shep. Touch. 75).

(*i*) That is, where no property is mentioned in the premises. But if the premises and the habendum are at variance the case is different, and *primâ facie* only the property mentioned in the premises would pass. This is the case put in Shep. Touch. 76: "If a man grant Blackacre only in the premises of a deed, habendum Blackacre and Whiteacre, Whiteacre will not pass by this deed." A right may pass under "appurtenances" in the habendum, although not named in the premises (*Renwick* v. *Daly* (1877), 11 I. R. C. L. 126).

(*k*) *E.g.*, habendum, part for twenty years and other part for ten years (*Carew's Case* (1586), Moore (K. B.), 222).

(*l*) *Goodtitle* v. *Gibbs* (1826), 5 B. & C. 709, 717. Upon a grant to A. and B., habendum to A. for life, remainder to B. for life, the limitation in the habendum will exclude the joint tenancy for life which would be implied from the premises, and give estates to A. and B. for life in succession (*Buckler's Case* (1597), 2 Co. Rep. 55 a, b; Co. Litt. 183 b); see *Scovel* v. *Cabel* (1588), Cro. Eliz. 89, 107; *Anon.* (1562), Moore (K. B.), 43, pl. 133.

(*m*) Thus on a grant by A. to B., habendum to B. in tail after the death of A., the express limitation in the habendum is void as attempting to create a

SECT. 8. The Habendum.

**826.** Where, however, an estate has been limited in the premises, this is treated as indicating the intention of the grantor, and the subsequent limitation in the habendum, though it may enlarge it (*n*), or may qualify or explain it (*o*), cannot directly abridge it (*p*), and, so far as repugnant to it or contrary to the rules of law, must be disregarded (*q*).

Habendum cannot cut down estate limited in premises.

## SECT. 9.—*Covenants* (*r*).

### SUB-SECT. 1.—*What Constitutes a Covenant.*

**827.** A covenant is an agreement under seal whereby the parties, or some or one of them, are or is bound to do or not to do a specified thing—as covenants in an indenture of lease to pay rent or not to carry on certain trades; or whereby they undertake that a certain state of affairs exists—as a covenant in a conveyance that the grantor is entitled or that he has not incumbered (*s*). But the word will be construed to cover stipulations in an agreement under hand if otherwise it would have no effect, as where a document refers to the "covenants" contained in a lease which is not under

Definition and construction of covenant.

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freehold *in futuro*, and, since no limitation can be implied in the premises, the grant is void (*Hogg* v. *Cross* (1591), Cro. Eliz. 254; *Buckler's Case* (1597), 2 Co. Rep. 55 a, b; *Stukeley* v. *Butler* (1615), Hob. 168, 171).

(*n*) *Kendal* v. *Micfeild* (1740), Barn. (CH.) 46, 47. Grant to A. and the heirs of his body, habendum to A. and his heirs, gives a fee simple (S. C.); sometimes this has been said to give an estate tail and a fee simple expectant (*Altham's Case* (1610), 8 Co. Rep. 150 b, 154 b).

(*o*) Thus in a grant to A. and his heirs, habendum to A. and the heirs of his body, the habendum explains "heirs" in the premises, and A. takes only an estate tail (*Altham's Case, supra*); unless on the whole deed the fee is held to pass (*Turnman* v. *Cooper* (1618), Cro. Jac. 476). Similarly, upon a grant to A., his heirs and assigns, habendum to A. and his assigns during the life of B., the estate *pur autre vie* in the habendum shows that "heirs" in the premises is used to denote the heir as special occupant and not as a word of limitation (*Doe* d. *Timmis* v. *Steele* (1843), 4 Q. B. 663; see *Pilsworth* v. *Pyet* (1671), T. Jo. 4; *Pigot* v. *Salisbury* (1674), Poll. 146, 151; *Kerr* v. *Kerr* (1854), 4 I. Ch. R. 493). And the habendum, though void, may, with other parts of the deed, be looked at for the purpose of qualifying the estate granted by the premises (*Hagarty* v. *Nally* (1862), 13 I. C. L. R. 532; *Throckmerton* v. *Tracy* (1555), 1 Plowd. 145, 153, 160)

(*p*) *Kendal* v. *Micfeild, supra;* see *Throckmerton* v. *Tracy, supra;* Co. Litt. 299 a. As to ships, see *Reid* v. *Fairbanks* (1853), 13 C. B. 692.

(*q*) *Goodtitle* v. *Gibbs* (1826), 5 B. & C. 709, 717, where an immediate estate of freehold limited in the premises took effect, and a limitation of a freehold *in futuro* in the habendum was rejected (*Carter* v. *Madgwick* (1692), 3 Lev. 339; *Doe* d. *Timmis* v. *Steele* (1843), 4 Q. B. 663, 667; *Boddington* v. *Robinson* (1875), L. R. 10 Exch. 270, 273. In this last case a grant by a tenant for life to J., his executors, administrators, and assigns, was held to be an express limitation *pur autre vie*—but as to this see Challis on Real Property, 2nd ed., p. 98—and it prevailed over the limitation of a future freehold in the habendum). See *Underhay* v. *Underhay* (1588), Cro. Eliz. 269; and compare *Goshawke* v. *Chiggell* (1629), Cro. Car. 154; *Bernard* v. *Bonner* (1648), Aleyn, 58; *Germain* v. *Orchard* (1691), 1 Salk. 346.

(*r*) Much of the matter contained in this section applies also to agreements not under seal; see, further, title CONTRACT, Vol. VII., pp. 463 *et seq.* As to illegal covenants, see *ibid.*, pp. 390 *et seq.*

(*s*) *Randall* v. *Lynch* (1810), 12 East, 179, 182; *Russell* v. *Watts* (1885), 10 App. Cas. 590, 611. Where in a deed the parties agreed "by way of declaration

SECT. 9. **Covenants.**

seal (*t*). The words of a covenant are to be taken most strongly against the covenantor; but this must be qualified by the observation that due regard must be paid to the intentions of the parties as collected from the whole context of the instrument (*u*).

The person bound by the covenant.

**828.** Where a deed, purporting to bind various parties, provides that some one of the parties shall do an act or make a payment, this stipulation is a covenant by that party with the others (*a*); and similarly, an agreement of all parties that property shall be dealt with in a particular way is a covenant by those parties whose concurrence is required to give effect to the provision in favour of those who are to take the benefit of the conveyance (*b*).

How a covenant is made.

**829.** No particular technical words are necessary for the making of a covenant (*c*). Any words which, when properly construed with the aid of all that is legitimately admissible to aid in the construction of a written document, indicate an agreement constitute, when under seal, a covenant (*d*). But it must be clear that the words are intended to operate as an agreement (*e*), and not merely as words of condition or qualification (*f*). Express words of agreement, such as "covenant," "agree" (*g*), or "engage" (*h*), may be used; but, without such words, an agreement may be collected from the entire instrument, and a covenant when so made out by construction—sometimes called an implied covenant—is for all purposes an express covenant, and is as effectual as if the word "covenant" had been used (*i*). But a specific covenant as to one

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and not of covenant," these words were rejected as "nonsense" (*Ellison* v. *Bignold* (1821), 2 Jac. & W. 503, 510).

(*t*) *Hayne* v. *Cummings* (1864), 16 C. B. (N. S.) 421, 426; *Brookes* v. *Drysdale* (1877), 3 C. P. D. 52.

(*u*) *Browning* v. *Wright* (1799), 2 Bos. & P., 13, *per* Lord ELDON, C.J., at p. 22; and see p. 441, *ante*.

(*a*) *Dawes* v. *Tredwell* (1881), 18 Ch. D., 354, C. A., *per* JESSEL, M.R., at p. 359; see *Ramsden* v. *Smith* (1854), 2 Drew. 298, 307, 308.

(*b*) *Willoughby* v. *Middleton* (1862), 2 John. & H. 344, *per* WOOD, V.-C., at p. 354.

(*c*) *Lant* v. *Norris* (1757), 1 Burr. 287, *per* Lord MANSFIELD, C.J., at p. 290; Shep. Touch. 162; *Sampson* v. *Easterby* (1829), 9 B. & C. 505, 512, affirmed (1830), 6 Bing. 644, Ex. Ch.; *Wolveridge* v. *Steward* (1833), 1 Cr. & M. 644, 657, Ex. Ch.

(*d*) *Russell* v. *Watts* (1885), 10 App. Cas. 590; *Rashleigh* v. *South Eastern Rail. Co.* (1851), 10 C. B. 612, 632; *James* v. *Cochrane* (1852), 7 Exch. 170, *per* PARKE, B., at p. 177; *Knight* v. *Gravesend and Milton Waterworks Co.* (1857), 2 H. & N. 6, 11; see *Hill* v. *Carr* (1676), 1 Cas. in Ch. 294: "Wherever the intent of the parties can be collected out of a deed for the doing or not doing a thing, a covenant will lie"; see *Brice* v. *Carre* (1661), 1 Lev. 47.

(*e*) *Courtney* v. *Taylor* (1843), 6 Man. & G. 851, *per* TINDAL, C.J., at p. 867; *Iven* v. *Elwes* (1854), 3 Drew. 25, *per* KINDERSLEY, V.-C., at p. 34. A statement in a deed of a binding intention to create restrictive covenants on the part of vendors who execute the deed, made as an inducement to purchasers, is as effective as a formal covenant (*Mackenzie* v. *Childers* (1889), 43 Ch. D. 265, 275).

(*f*) *Wolveridge* v. *Steward* (1833), 1 Cr. & M. 644, Ex. Ch., *per* Lord DENMAN, C.J., at p. 657; Com. Dig. tit. Covenant (A, 3); see pp. 478, 482, *post*.

(*g*) The word "covenant" is not more powerful than the word "agree" (*Monypenny* v. *Monypenny* (1861), 9 H. L. Cas., 114, *per* Lord ST. LEONARDS, at p. 137).

(*h*) *Rigby* v. *Great Western Rail. Co.* (1845), 14 M. & W. 811.

(*i*) Shep. Touch. 162; *Williams* v. *Burrell* (1845), 1 C. B. 402, 431: "The legal

matter may prevent a covenant being implied as to a cognate matter (*k*).

SUB-SECT. 2—*Covenants arising by Construction.*

Intention to create obligation.

**830.** A covenant will arise by construction where the instrument shows an intention that the party shall be bound, although it contains no express words of obligation. Thus, if in an instrument executed under seal by two persons one agrees to pay a specified sum for the other's land, this implies a covenant by the latter to convey (*l*); an agreement in a charterparty that forty days shall be allowed for unloading and reloading implies a covenant not to detain the ship for a longer period (*m*). An agreement under seal to execute a deed which would contain a covenant to pay money creates a specialty debt (*n*). An assignment of property, such as an interest in a medicine, may raise an implied covenant by the vendor not to prepare and sell the medicine, on the principle that he must not derogate from his grant (*o*). Similarly, a conveyance with a restriction against carrying on certain trades will imply a corresponding covenant (*p*). But a clause in a settlement indemnifying trustees in respect of moneys which they do not receive does not imply a covenant by them to account for moneys which they do receive (*q*).

Where an instrument creating a trust contains a declaration of trust, and the trustee executes it, this operates as a covenant by him (*r*); though it will not be so if the trustee does not execute the deed, but only acts under it (*s*), or where the deed, though

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effect and operation of the covenant, whether framed in express terms, that is, whether it be an express covenant, or whether the covenant be matter of inference and argument, is precisely the same; and an implied covenant in this sense of the term differs nothing in its operation and legal consequences from an express covenant"; see *St. Albans* (*Duke*) v. *Ellis* (1812), 16 East, 352, *per* Lord ELLENBOROUGH, C.J., at p. 355.

(*k*) *Sharp* v. *Waterhouse* (1857), 7 E. & B. 816, 827.

(*l*) *Pordage* v. *Cole* (1669), 1 Wms. Saund. 319; compare *Wood* v. *Copper Miners' Co.* (1849), 7 C. B. 906, where, upon a covenant by a lessee to take coals, there was implied a covenant by the lessor to supply them; *Great Northern Rail. Co.* v. *Harrison* (1852), 12 C. B. 576 (contract by one party to supply and by other party to take sleepers as the engineer should call for them).

(*m*) *Randall* v. *Lynch* (1810), 12 East, 179.

(*n*) *Saunders* v. *Milsome* (1866), L. R. 2 Eq. 573; *Kidd* v. *Boone* (1871), L. R. 12 Eq. 89.

(*o*) *Seddon* v. *Senate* (1810), 13 East, 63; compare *Trego* v. *Hunt*, [1896] A. C. 7; *Gerard* v. *Lewis* (1867), L. R. 2 C. P. 305. Where partners have assigned all their partnership property, a partner in whom any such property is solely vested impliedly covenants to do what is necessary to transfer it to the assignee (*Aulton* v. *Atkins* (1856), 18 C. B. 249); but not to pay to the assignee money which he owes to the partnership (S. C.). And as to assignments operating by way of covenant, see *Deering* v. *Farrington* (1674), 1 Mod. Rep. 113; *Caister* (*Parish*) v. *Eccles* (*Parish*) (1701), 1 Ld. Raym. 683.

(*p*) *Hodson* v. *Coppard* (1860), 29 Beav. 4.

(*q*) *Bartlett* v. *Hodgson* (1785), 1 Term Rep. 42.

(*r*) *Benson* v. *Benson* (1710), 1 P. Wms. 130; *Mavor* v. *Davenport* (1828), 2 Sim. 227; *Turner* v. *Wardle* (1834), 7 Sim. 80; *Wood* v. *Hardisty* (1846), 2 Coll. 542. A breach of trust constitutes in general only a simple contract debt (*Vernon* v. *Vawdry* (1740), 2 Atk. 119).

(*s*) *Richardson* v. *Jenkins* (1853), 1 Drew. 477.

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executed by the trustee, contains only an acceptance by him of the trust (*t*).

Provisoes and participial phrases.

**831.** A grant or a covenant may be followed by words contemplating that one of the parties is to do or abstain from doing some act. Such words are commonly introduced by "provided that," or "to be," or they are contained in a participial clause; and they may operate as a condition for, or qualification of, the preceding covenant, or as a separate covenant. For them to operate as a covenant it must appear that the act or abstention is intended to be obligatory. The words "provided" or "on condition" may have this effect (*a*); and when a covenant by a lessee to repair is followed by "provided always and it is agreed" that the lessor shall find timber or other materials, these words create a covenant by the lessor (*b*). But in general, if a lessee's covenant to repair is followed by a proviso that the lessor shall find timber, without "agreed," or by such words as "the lessor first allowing timber," or "the premises being previously put in repair by the lessor," these will be only a qualification of the lessee's covenant (*c*).

Where, however, the words express the consideration for the previous covenant or grant, or the condition upon which permission or liberty to do an act is conferred, they will usually be obligatory and will make a covenant—as where one person covenants to pay money to another, the latter "making him an estate" in certain lands (*d*); where a lease is made, the lessee "yielding and paying" rent (*e*), or "rendering" rent clear of taxes (*f*), or "doing suit" to the lessor's mill (*g*); where in a lease trees are reserved to the lessor with liberty to fell them, "repairing the hedges where they grow" (*h*). And by similar words a negative covenant may be raised. Thus, permission to a person to cut down wood for repairs

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(*t*) *Adey* v. *Arnold* (1852), 2 De G. M. & G. 432; *Holland* v. *Holland* (1869), 4 Ch. App. 449; compare *Isaacson* v. *Harwood* (1868), 3 Ch. App. 225.

(*a*) Com. Dig. tit. Covenant (A. 2); Shep. Touch. 162; *Brookes* v. *Drysdale* (1877), 3 C. P. D. 52, 58; see *Ashton* v. *Stock* (1877), 6 Ch. D. 719.

(*b*) *Brookes* v. *Drysdale, supra*; see *Ashton* v. *Stock, supra*.

(*c*) *Holder* v. *Tayloe* (1614), 1 Roll. Abr. 518; *Cromwel's (Lord) Case* (1601), 2 Co. Rep. 69 b, 72 a, n. (I); Bac. Abr. tit. Covenant (A), note; *Thomas* v. *Cadwallader* (1744), Willes, 496; see Shep. Touch. 122; Co. Litt. 203 b. But in *Mucklestone* v. *Thomas* (1739), Willes, 146, "slates being found, allowed, and delivered on the premises" by the lessor implied a covenant by him; and similarly in *Cannock* v. *Jones* (1849), 3 Exch. 233, where a lessee covenanted to repair windows and hedges, the premises "being previously put in repair and kept in repair by" the lessor; see as to such words being a condition precedent, *Neale* v. *Ratcliff* (1850), 15 Q. B. 916; and see p. 491, *post*.

(*d*) *Large* v. *Cheshire* (1671), 1 Vent. 147; compare *Boone* v. *Eyre* (1779), 2 Wm. Bl. 1312.

(*e*) *Porter* v. *Swetnam* (1654), Sty. 406; *Hellier* v. *Casbard* (1665), 1 Sid. 266; *Webb* v. *Russell* (1789), 3 Term Rep. 393, p. 402; *Iggulden* v. *May* (1804), 9 Ves. 325, p. 330; *Vyvyan* v. *Arthur* (1823), 1 B. & C. 410; see Plat on Covenants, p. 50.

(*f*) *Giles* v. *Hooper* (1690), Carth. 135.

(*g*) *Vyvyan* v. *Arthur* (1823), 1 B. & C. 410.

(*h*) This is a covenant by the lessor (*Warren* v. *Arthur* (1682), 2 Mod. Rep. 317).

"without making waste" implies a covenant by him not to commit waste (*i*); and a covenant by a lessee to plough and cultivate the demised premises "except the rabbit warren and sheep walk" implies a covenant not to plough up the excepted part (*k*).

When express covenant implies a covenant to do a preliminary act.

**832.** If the terms of an agreement show that the parties contemplated that a certain thing, as to which there is no express covenant, would be done before another thing, as to which there is an express covenant, is done, it is a question whether the agreement can be read as comprising a covenant to do the former. If the two things are so involved that the parties cannot be supposed to have intended to impose an obligation to do one without imposing also an obligation to do the other, then there is, by construction, a covenant to do the first thing (*l*). But otherwise it is not to be assumed that the parties intended to bind themselves to do the first thing because they entered into the contract in the expectation that it would be done, treating it as a thing certain to take place and providing only for the event of its taking place. In such a case there will usually be no covenant implied to do the first thing, but if it is not done, then the express covenant to do the other thing does not become operative (*m*).

Implied covenant for continuance of business etc.

**833.** A similar question arises where an arrangement is entered into which can only take effect by the continuance of a certain existing state of circumstances. There is then an implied engagement on the part of that party upon whom this continuance depends that he will do nothing of his own motion to put an end to the state of circumstances in question (*n*). Thus, where a business is sold in consideration of the vendor receiving a share of the profits for a specified time, there is an implied agreement by the purchaser to carry it on for that time (*o*). But in general, although the effective operation of an agreement may depend upon the continuance of a business—as in the case of a contract to supply all of certain goods produced in a specified period (*p*)—or of

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(*i*) *Stevinson's Case* (1589), 1 Leon. 324.

(*k*) *St. Albans* (*Duke*) v. *Ellis* (1812), 16 East, 352.

(*l*) Thus, a covenant by a lessee to fold a flock of sheep in the usual places involves a covenant to keep a flock (*Webb* v. *Plummer* (1819), 2 B. & Ald. 746); a covenant by a lessee to supply lime to the lessor at all times of burning implies a covenant to burn lime (*Shrewsbury* (*Earl*) v. *Gould* (1819), 2 B. & Ald. 487).

(*m*) A covenant by a railway company to make a bridge over an intended new cut for a stream did not raise a covenant by them to make the new cut and divert the stream (*Rashleigh* v. *South Eastern Rail. Co.* (1851), 10 C. B. 612; but as to this case, see *Knight* v. *Gravesend and Milton Waterworks Co.* (1857), 2 H. & N. 6); see, in a mining lease, as to sinking pits, *James* v. *Cochrane* (1852), 7 Exch. 170; (1853) 8 Exch. 556, Ex. Ch.; as to obtaining a necessary consent, *Smith* v. *Harwich Corporation* (1857), 2 C. B. (N. S.) 651. See also *Morell* v. *New London Discount Co.* (1902), 18 T. L. R. 507.

(*n*) *Stirling* v. *Maitland* (1864), 5 B. & S. 840, *per* COCKBURN, C.J., at p. 852.

(*o*) *M'Intyre* v. *Belcher* (1863), 14 C. B. (N. S.) 654; *Telegraph Despatch and Intelligence Co.* v. *McLean* (1873), 8 Ch. App. 658; *Hope* v. *Gibbs* (1877), 47 L. J. (CH.) 82; see *Ogdens, Ltd.* v. *Nelson*, [1905] A. C. 109.

(*p*) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q. B. 488, C. A.

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other existing circumstances—as the keeping up of a patent (*q*)—there is no obligation to maintain such existing state (*r*).

A contract to employ and pay specified wages for a fixed period does not bind the employer to carry on the business (*s*), or to provide work (*t*), but only to pay the wages if the employee is willing to work (*a*). But the special circumstances of the engagement may imply a covenant that the employee shall be actually employed (*b*).

SUB-SECT. 3.—*Covenants in Law.*

Covenants implied from :—

**834.** A covenant in law is an agreement which the law implies from the use of certain words having a known legal operation in the creation of an estate; so that, after they have had their primary operation in creating the estate, the law gives them a secondary force by implying an agreement on the part of the grantor to protect and preserve the estate which by these words has been already created (*c*).

"Demise."

Thus, upon a lease by deed using the word "demise" there are implied covenants for title (*d*) and for quiet enjoyment (*e*). The

(*q*) "The safest rule in such cases to follow, when there is any reasonable doubt whether the parties did intend to enter into a covenant such as is sought to be implied here, is to look at the deed and at the circumstances under which the deed was made; and if you find that there is no such covenant in the deed, and that there has been no bad faith on the part of those against whom it is sought to imply such a covenant, the court ought to be extremely careful how it implies such a covenant in a well-considered deed, where there are no words whatever which express that covenant in any way" (*per* KAY, J., in *Re Railway and Electric Appliances Co.* (1888), 38 Ch. D. 597, at p. 608). A deed is to be more carefully construed than a preliminary agreement (*ibid.*, p. 605); and see *Churchward* v. *R.* (1865), L. R. 1 Q. B. 173, *per* COCKBURN, C.J., at p. 195.

(*r*) Thus, on an employment of an agent at a commission for a fixed time, there is no implied agreement that the business shall continue to be carried on (*Re English and Scottish Marine Insurance Co., Ex parte Maclure* (1870), 5 Ch. App. 737; *Rhodes v. Forwood* (1876), 1 App. Cas. 256); *Northey* v. *Trevillion* (1902), 18 T. L. R. 648; unless there is an express contract to employ the agent as well as to pay the commission (*Turner* v. *Goldsmith*, [1891] 1 Q. B. 544, C. A.); compare *Beswick* v. *Swindells* (1835), 3 Ad. & El. 868, Ex. Ch., where there was a contract to make a payment if the business was then carried on. See also title CONTRACT, Vol. VII., p. 430.

(*s*) *Aspdin* v. *Austin* (1844), 5 Q. B. 671; *Dunn* v. *Sayles* (1844), 5 Q. B. 685.

(*t*) *Turner* v. *Sawdon & Co.*, [1901] 2 K. B. 653, C. A.

(*a*) *Ibid.*; see *Churchward* v. *R.*, *supra*. See also *King* v. *Accumulative Assurance Co.* (1857), 3 C. B. (N. S.) 151: *Emmens* v. *Elderton* (1853), 4 H. L. Cas. 624.

(*b*) Thus, where a musical director of a theatre is to be advertised as such, he must actually fill the post in order to make the advertisements true, and consequently he is entitled to be employed (*Bunning* v. *Lyric Theatre* (1894), 71 L. T. 396).

(*c*) *Williams* v. *Burrell* (1845), 1 C. B. 402, 429.

(*d*) That is, that the lessor has power to let (*Holder* v. *Taylor* (1613), Hob. 12; *Burnett* v. *Lynch* (1826), 5 B. & C. 589, p. 609; compare *Kean* v. *Strong* (1845), 9 I. L. R. 74, p. 82); but this need not be power to grant the term mentioned in the lease; it is sufficient that the lessor is entitled to put the lessee into possession, otherwise this covenant would go beyond the implied covenant for quiet enjoyment, which is restricted to the interest of the lessor (*Adams* v. *Gibney* (1830), 6 Bing. 656; *Baynes & Co.* v. *Lloyd & Sons*, [1895] 2 Q. B. 610, C. A.); see *Bragg* v. *Wiseman* (1614), Brownl. 22, put upon the ground that a covenant in law shall not be extended to make one do more than he can). It is perhaps more correct to say that only one covenant is implied of which either want of title or an eviction would be a breach (*per* ALDERSON, B., in *Line* v. *Stephenson* (1838), 5 Bing. (N. C.) 183, at p. 184, Ex. Ch.; *Baynes & Co.* v. *Lloyd & Sons*, *supra*). See title LANDLORD AND TENANT.

(*e*) *Baynes & Co.* v. *Lloyd & Sons*, *supra*. An implied contract for quiet

latter covenant is limited in duration to the interest of the lessor (*f*), but extends to the acts of persons claiming by title paramount to him (*g*). The covenant is implied only against the person actually demising, not against one who joins to confirm (*h*). Where several demise jointly the covenant for title is joint, but the covenant for quiet enjoyment is several, so that either lessor can be sued alone for disturbance caused by himself (*i*). The implication of these covenants will be prevented by the existence of express covenants (*k*).

"Grant."

**835.** Formerly the words "give" or "grant" in a deed operated as a warranty of title (*l*); but in deeds executed after October 1st, 1845, these words do not imply any covenant in law, in respect of lands or hereditaments, except so far as they may imply a covenant by force of a statute (*m*).

Under a conveyance of superfluous lands made by the promoters of a public undertaking the word "grant," unless restrained or limited by express words, operates as an express covenant for title, for quiet enjoyment, and for further assurance (*n*).

SUB-SECT. 4.—*Qualified Covenants.*

Conditional covenants.

**836.** A covenant may be absolute or qualified, and in the latter case the qualification may be introduced either by way of condition

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enjoyment arises also upon an agreement for letting, out of the mere relation of landlord and tenant, without any use of the word "demise" (*Budd-Scott* v. *Daniell*, [1902] 2 K. B. 351; *Hart* v. *Windsor* (1843), 12 M. & W. 68, p. 85; *Bandy* v. *Cartwright* (1853), 8 Exch. 913; *Hall* v. *City of London Brewery Co.* (1862), 2 B. & S. 737; *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145; *Robinson* v. *Kilvert* (1889), 41 Ch. D. 88, 96, C. A.; *Markham* v. *Paget*, [1908] 1 Ch. 697); though the contract so implied from a mere letting is restricted to the acts of the lessor and those claiming under him (*Jones* v. *Lavington*, [1903] 1 K. B. 253, C. A.), and is limited to the interest of the lessor (*Penfold* v. *Abbott* (1862), 32 L. J. (Q. B.) 67; *Baynes & Co.* v. *Lloyd & Sons*, [1895] 2 Q. B. 610, C. A.).

(*f*) See note (*d*) on p. 480, *ante*.

(*g*) *Line* v. *Stephenson* (1838), 4 Bing. (N. C.) 678; 5 Bing. (N. C.) 183, Ex. Ch.

(*h*) *Smith* v. *Pocklington* (1831), 1 Cr. & J. 445.

(*i*) *Coleman* v. *Sherwin* (1689), 1 Salk. 137.

(*k*) *Stannard* v. *Forbes* (1837), 6 Ad. & El. 572; *Line* v. *Stephenson* (1838), 5 Bing. (N. C.) 183, Ex. Ch.

(*l*) *Williams* v. *Burrell* (1845), 1 C. B. 402; Co. Litt. 384 a, n. (1).

(*m*) Real Property Act, 1845 (8 & 9 Vict. c. 106); see Dart's Vendors and Purchasers, 7th ed., Vol. I., p. 586. Under the early Yorkshire Registries Acts, 6 Ann. cc. 20, 62, and 8 Geo. 2, c. 6, the words "grant, bargain and sell" implied covenants for title, but the Acts were repealed by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 51.

(*n*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 132. But here the terms of covenants to be implied are set out in the statute. A similar device was contained in the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), s. 46, repealed by the Companies Act, 1862 (25 & 26 Vict. c. 89). The covenants implied under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), where a person conveys as "beneficial owner," or "as settlor," or as "trustee," "mortgagee," or "personal representative," are a device for introducing express covenants in short language. These covenants are implied in accordance with the intention of the conveying party, and are in effect express; a covenant in law operates whether so intended by the party or no.

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or by way of limitation. A qualification by way of condition is introduced by such words as "on condition that" or "provided that," or is expressed in a participial clause (*o*), and it may take effect by way of condition precedent or condition subsequent. If it is a condition precedent, it must be satisfied before the liability on the covenant can arise (*p*); if it is a condition subsequent, then, upon performance of the condition, the liability under the covenant ceases (*q*). A qualification which is repugnant to the rest of the covenant will be rejected (*a*).

Limited covenants.

**837.** A covenant is qualified by way of limitation when words are introduced into it which limit in some respect the liability of the covenantor, and this is the more usual use of the term "qualified covenant" (*b*). The limitation will be effectual though not introduced into the covenant itself, but placed in some other part of the deed, if its application to the particular covenant is clear (*c*); and it may arise by construction although not expressly stated (*d*). A

(*o*) See p. 478, *ante;* and as to the qualification implied in "Provided always," see *Martelli* v. *Holloway* (1872), L. R. 5 H. L. 532.

(*p*) Thus, in a covenant by a lessee to repair provided the lessor finds timber, the proviso is a condition precedent (see cases referred to at p. 478, *ante*). Such a condition may also be a cross-covenant (2 Bac. Abr. tit. Covenant (A), p. 340, n.). As to performance by a lessee of his covenants being a condition precedent to the lessor's liability under a covenant to renew, see *Bastin* v. *Bidwell* (1881), 18 Ch. D. 238, and see Bac. Abr. tit. Conditions; and as to covenants which are also conditions, see p. 489, *post*.

(*q*) A clause providing for cesser of an agent's liability under a charterparty on the goods being shipped operates as a condition subsequent (*Bannister* v. *Breslauer* (1867), L. R. 2 C. P. 497). The condition of a bond is technically a condition subsequent, though in substance the liability on the bond is conditional on breach of the condition (Leake on Contracts, 5th ed., p. 445). In a covenant not to assign without consent, with a proviso that consent shall not be unreasonably withheld, the proviso is a qualification of the covenant and operates by way of condition subsequent. If, upon request for consent, it is unreasonably withheld, then the liability under the covenant for that occasion ceases, and the lessee can assign without consent (*Treloar* v. *Bigge* (1874), L. R. 9 Exch. 151; *Sear* v. *House Property and Investment Society* (1880), 16 Ch. D. 387; *Young* v. *Ashley Gardens Properties, Ltd.*, [1903] 2 Ch. 112, C. A.).

(*a*) *Belcher* v. *Sikes* (1828) 8 B. & C. 185.

(*b*) Thus, a covenant for quiet enjoyment may be either absolute, so that the covenantor covenants against lawful disturbance by any person whomsoever, or it may be qualified by a limitation to disturbance by the covenantor or persons rightfully claiming under him. See *Sanderson* v. *Berwick-on-Tweed Corporation* (1884), 13 Q. B. D. 547, C. A.; *Harrison, Ainslie & Co.* v. *Muncaster*, [1891] 2 Q. B. 680, C. A.

(*c*) See *Brown* v. *Brown* (1662), 1 Lev. 57, where covenants for title were qualified by a "remote agreement at the end of the deed."

(*d*) See *Sicklemore* v. *Thistleton* (1817), 6 M. & S. 9, where a surety for a lessee was not chargeable till after forty days' default by the lessee and demand made on the surety. In *Hesse* v. *Albert* (1828), 3 Man. & Ry. (K. B.) 406, a covenant to pay an annuity was qualified by a recital so as to be a covenant only to pay out of a particular source. But a recital in a conveyance which shows a defect in the grantor's title does not qualify his covenants for title, which must be construed with reference to the title expressed to be conveyed in the operative part, and he is liable for a breach arising through this defect (*Page* v. *Midland Rail. Co.*, [1894] 1 Ch. 11, C. A.); nor is a covenant for title qualified by a reference to the instrument under which the title is derived, unless the interest expressed to be conveyed is in the operative part restricted to whatever was thereby acquired (*Cooke* v. *Founds* (1661), 1 Lev. 40; *May* v. *Platt*, [1900] 1 Ch. 616, 620, C. A.; compare *Delmer* v. *M'Cabe* (1863), 14 I. C. L. R. 377, 384).

covenant in form absolute may be qualified by another covenant providing for an alternative event (*e*).

Covenants for title.

**838.** Questions as to the effect of qualifying words have usually arisen where a group of covenants, such as covenants for title, occur in a deed, and some are expressly qualified, while others are in form absolute. It has then to be determined whether, on the true construction of the deed, the qualifying words are to be read as extending to the other covenants (*f*). This will depend in the first instance on the grammatical connection of the covenants—whether as a matter of grammar the qualifying words apply to other covenants than that in which they are inserted (*g*); and, next, upon whether the various covenants have the same or different objects. If they have objects so similar that the covenantor cannot be supposed to have intended to limit his liability under one covenant without also limiting it under the other, then the qualifying words will be taken as applying to both. This is so whether the qualifying words occur in the earlier covenant, so that the earlier limited covenant restricts a subsequent general one (*h*), or, it would seem, whether they occur in a subsequent covenant, so as to control an earlier general covenant (*i*). But where the covenants have

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(*e*) As an agreement to pay a sum by instalments for specified work, with an agreement, if the work is not proceeded with, to refer the remuneration to arbitration (*Hemans* v. *Picciotto* (1857), 1 C. B. (N. S.) 646); compare *Molyneux* v. *Richard*, [1906] 1 Ch. 34 (absolute covenant to build house not restricted by power to use land for spoil banks).

(*f*) It was formerly supposed that the restrictive clause might qualify all the covenants if it was placed first or last in the string of covenants, but not if it occurred in the middle (see this rule stated more fully in *Gainsford* v. *Griffith* (1667), 1 Wms. Saund. 51, 60); but the construction depends on the intention as appearing from the whole instrument, and not merely on the order of the covenants (1 Wms. Saund. p. 60, n. (4)); see the four rules of construction suggested by Lord ST. LEONARDS (Sugden, Vendor and Purchaser, 14th ed., p. 605), and the criticism of them in Dart, Vendor and Purchaser, 7th ed., Vol. II., 798, 799.

(*g*) See *Rich* (*Lady*) v. *Rich* (*Lord*) (1585), Cro. Eliz. 43; *Browning* v. *Wright* (1799), 2 Bos. & P. 13, where one ground of decision was that the two covenants formed one sentence (*per* Lord ELDON, C.J., pp. 21. 26; *per* BULLER, J., p. 27). The phrase "but that" indicates that the succeeding words are dependent on the earlier, and they incorporate any preceding qualification (*Broughton* v. *Conway* (1564), Moore (K. B.), 58; better reported, 2 Dyer, 240 a; *Gervis* v. *Peade* (1598), Cro. Eliz. 615); and as to covenants *in pari materia* being construed together, even when the parties are different, see *Martyn* v. *M'Namara* (1843), 4 Dr. & War. 411.

(*h*) Thus, in covenants for title, those which covenant for title as such, and not for possession, have the same object (*Howell* v. *Richards* (1809), 11 East, 633, 642); and a limitation in a covenant for seisin has been read into the following covenant for right to convey (*Nervin* v. *Munns* (1582), 3 Lev. 46; *Browning* v. *Wright* (1799), 2 Bos. & P. 13); as to leaseholds, see *Foord* v. *Wilson* (1818), 8 Taunt. 543; *Stannard* v. *Forbes* (1837), 6 Ad. & El. 572. Similarly, the words "joint and several" at the beginning of lessees' covenants will govern all the following covenants, although not grammatically connected, unless there is something to restrain them to the earlier covenants (*Northumberland* (*Duke*) v. *Errington* (1794), 5 Term Rep. 522).

(*i*) See the criticism on Lord ST. LEONARDS' second rule referred to in note (*f*), *supra*; and compare *Nind* v. *Marshall* (1819), 1 Brod. & Bing. 319. It may be easier for an earlier restricted covenant to control a subsequent general one, but,

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different objects, qualifying words in one will not be applied to the other in whatever order the covenants come (*k*).

Vendor's implied covenants under Conveyancing Act, 1881.

In the covenant for title implied under s. 7 (1) (a) of the Conveyancing Act, 1881, from the words "beneficial owner" the covenants for right to convey, for quiet enjoyment, freedom from incumbrances, and for further assurance are not four separate and distinct covenants, but parts of one entire covenant, the whole being controlled by the prefatory words limiting the covenant to the acts or omissions of the person conveying, and those through whom he derives title otherwise than by purchase for value (*l*).

Qualification implied from circumstances.

**839.** Covenants may also be qualified by the circumstances of the particular case. Thus, a covenant in terms absolute may be restricted to events which, having regard to the circumstances, both parties, at the time when the covenant was entered into, contemplated, or ought to have contemplated if they had thought properly about the matter (*m*). And it is not sufficient that one of the parties did in fact contemplate a wider interpretation (*n*).

SUB-SECT. 5.—*Joint and Several Covenants.*

Several covenantors or covenantees.

**840.** Where there are several covenantors or covenantees the covenant may, as regards the liability of the covenantors, be either

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having regard to the reason stated in the text, the order of the covenants does not seem to be very material (see *Woodyard* v. *Dannock* (1600), Cro. Eliz. 762, where an exception of a specified incumbrance in the covenant against incumbrances was carried back to the covenant for seisin in fee). In some cases the general covenant had limited covenants both before and after it (*Nervin* v. *Munns* (1582), 3 Lev. 6; *Browning* v. *Wright* (1799), 2 Bos. & P. 13; *Nind* v. *Marshall* (1819), 1 Brod. & Bing. 319). But an absolute covenant for right to assign a patent is not qualified by a subsequent covenant that the assignor has not forfeited the right (*Hesse* v. *Stevenson* (1803), 3 Bos. & P. 565).

(*k*) The covenants for title and for right to convey are different in their object from the covenant for quiet enjoyment, and consequently a limited covenant for right to convey does not restrain a subsequent absolute covenant for quiet enjoyment (*Howell* v. *Richards* (1809), 11 East, 633; see the dissentient judgment of PARK, J., in *Nind* v. *Marshall*, *supra*; and compare *Young* v. *Raincock* (1849), 7 C. B. 310); nor does a subsequent limited covenant for quiet enjoyment restrain a preceding absolute covenant that a lease is valid (*Norman* v. *Foster* (1673), 1 Mod. Rep. 101; *Gainsford* v. *Griffith* (1667), 1 Wms. Saund. 51, 58; *Barton* v. *Fitzgerald* (1812), 15 East, 530, where the construction of the covenant for the validity of the lease as absolute was assisted by a recital; *Smith* v. *Compton* (1832), 3 B. & Ad. 189). Other cases in which the object of covenants was different, so that restrictive words in one did not control the other, are *Crayford* v. *Crayford* (1628), Cro. Car. 106 (limited covenant for seisin did not control covenant that lands were of specified annual value; so, too, *Hughes* v. *Bennet* (1638) Cro. Car. 495); *Crossfield* v. *Morrison* (1849), 7 C. B. 286 (covenant by purchaser to pay certain rents while he was in possession did not restrict covenant to indemnify against them); see *Saward* v. *Anstey* (1825), 10 Moore (C. P.), 55; *Kean* v. *Strong* (1845), 9 I. L. R. 74; reversed (1847), 10 I. L. R. 137, Ex. Ch. (unqualified covenant to renew lease not restricted by qualified covenant for quiet enjoyment). Upon a lease to two jointly at a rent, with a joint and several covenant to pay taxes, but no covenant to pay rent, the liability for rent is apparently joint (*R.* v. *Wakering* (*Inhabitants*) (1834), 5 B. & Ad. 971; see, too, *Wilmer* v. *Currey* (1848), 2 De G. & Sm. 347, 353).

(*l*) *David* v. *Sabin*, [1893] 1 Ch. 523, C. A., *per* LINDLEY, L.J., at p. 531.

(*m*) *Harrison, Ainslie & Co.* v. *Muncaster*, [1891] 2 Q. B. 680, C. A., *per* Lord ESHER, M.R., at p. 686.

(*n*) *Ibid.*

joint, or several, or at once joint and several; and it may, as regards the benefit to the covenantees, be either joint or several, but it cannot be both joint and several. The effect of the covenant depends upon the ordinary rules of construction assisted, especially as regards the benefit of the covenant, by the nature of the interests of the parties in its subject-matter.

Where the liability under the covenant is joint.

**841.** A covenant is joint, as regards the liability of the covenantors, where two or more persons covenant for themselves, without any words of severance, that they will do something, or that they or one of them will do something; that is, where the obligation is imposed upon the covenantors simply (*o*). The effect is that, while the covenantors are all living, anyone who is sued alone can insist on the others being joined (*p*), and upon the death of one the entire liability devolves upon the survivors or survivor (*q*). If one party is both covenantor and covenantee jointly with others, the covenant cannot be sued on (*r*) until after the death of that party (*s*).

Whether joint liability affected by separate interests.

The effect of a covenant which, as regards the liability of the covenantors, is in form clearly joint depends on the words themselves, and it is not controlled by the circumstance that the covenantors have separate interests in the subject-matter of the covenant. But if it is doubtful whether the covenant is joint or several, this is one of the points to be taken into consideration. In such a case it is permissible to look at the other parts of the deed, the interests of the covenantors, and any other circumstances appearing on the face of the instrument which will aid in the determination of the intention of the parties (*t*). There is no principle of equity requiring joint covenants to be treated as joint and several (*u*). A joint covenant by partners will be considered as several—at any rate, in a mercantile partnership—if it simply represents a pre-existing partnership liability, but not if the

Covenants by partners.

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(*o*) *E.g.*, We, A. and B., "bind ourselves, our heirs, executors, and administrators" to pay £4,000 (*Simpson* v. *Vaughan* (1739), 2 Atk. 31); A. and B. do hereby for themselves, their executors, administrators, and assigns, covenant with C. that they, A. and B. or one of them, their executors, administrators, or assigns, will pay the rent reserved by a lease and keep the premises in repair (*White* v. *Tyndall* (1888), 13 App. Cas. 263; *Clarke* v. *Bickers* (1845), 14 Sim. 639); L. and R. (R. being a surety) covenant with C. that they will pay rent, and further that L. will repair; the covenant to repair, as well as the covenant to pay the rent, is joint (*Copland* v. *Laporte* (1835), 3 Ad. & El. 517). But words purporting to make not only an original obligor, but also his executors, jointly liable with the other obligors have no effect. The liability of executors under a joint and several covenant is necessarily several only (*Read* v. *Price*, [1909] 1 K. B. 577).

(*p*) *King* v. *Hoare* (1844), 13 M. & W. 494; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, 515.

(*q*) *White* v. *Tyndall*, *supra*.

(*r*) *Boyce* v. *Edbrooke*, [1903] 1 Ch. 836; and see *Faulkner* v. *Lowe* (1848), 2 Exch. 595.

(*s*) *Rose* v. *Poulton* (1831), 2 B. & Ad. 822.

(*t*) *White* v. *Tyndall*, *supra*, *per* Lord HERSCHELL, at p. 276.

(*u*) *Sumner* v. *Powell* (1816), 2 Mer. 30; compare *Primrose* v. *Bromley* (1739), 1 Atk. 89.

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obligation arises solely under the covenant. The extent of the covenant is then measured only by its language (*v*).

Where the liability is several.

**842.** Where there are several covenantors and each undertakes only as regards his own acts or defaults, the covenant is said to be several, and the effect is the same as if several deeds were written upon the same piece of parchment (*x*). This form of covenant is employed when an aggregate sum is to be secured, but each covenantor is to be liable for only a part of it; as where several covenant "severally" to pay one £3, another £3 etc. (*a*), or where, without the word "severally," they covenant to pay £50 each (*b*).

Where the liability is joint and several.

**843.** In general a covenant is framed so as to be at once joint and several, and then it is at the election of the covenantee in which form he shall sue upon it; whether to charge all the covenantors together or the survivor alone on the joint covenant, or to charge one alone, or the executor of a deceased covenantor, with the entire liability on the several covenant (*c*). A joint and several covenant is now usually made by the words "jointly and severally," but it will arise from any other words which have the same effect, as "we and each of us" covenant (*d*); or A. and B. covenant for themselves and each of them (*e*).

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(*v*) *Sumner* v. *Powell* (1816), 2 Mer. 30; *Beresford* v. *Browning* (1875), L. R. 20 Eq. 564, affirmed on appeal 1 Ch. D. 31, C. A. A covenant for payment off of a partner's share is in general an arrangement for discharging a pre-existing joint and several liability, and will be treated as joint and several (*Beresford* v. *Browning*, *supra*). But where the covenant was the joint covenant of continuing partners to pay sums to an outgoing partner as the purchase price of his share it was held to be not merely a security for but different from the pre-existing liability, and was not several in equity (*Wilmer* v. *Currey* (1848), 2 De G. & Sm. 347). And joint covenants in a lease taken by partners for partnership purposes have been construed as joint only (*Clarke* v. *Bickers* (1845), 14 Sim. 639; *Levy* v. *Sale* (1877), 37 L. T. 709). In *Sumner* v. *Powell*, *supra*, a joint covenant to indemnify the executors of a deceased partner was held to be joint only. The distinction between the circumstances in *Wilmer* v. *Currey*, *supra*, and *Beresford* v. *Browning*, *supra*, is slight, and the authority of *Wilmer* v. *Currey*, *supra*, seems to be doubtful. A joint covenant by partners, although treated in equity as only joint during the lives of the partners, is in effect made several on the death of one, and the covenantee can prove against his estate (*Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, 517; *Re Hodgson*, *Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, C. A.), though he cannot maintain an action for administration of that estate (*Re McRae*, *Forster* v. *Davis*, *Norden* v. *McRae* (1883), 25 Ch. D. 16, C. A.); as to proof in bankruptcy, see *Re Shand*, *Ex parte Corbett* (1880), 14 Ch. D. 122, C. A.; and as to joint and several liability on a guarantee given by a firm and also by the several partners, see *Re Smith*, *Fleming & Co.*, *Ex parte Harding* (1879), 12 Ch. D. 557, C. A.

(*x*) *Mathewson's Case* (1597), 5 Co. Rep. 22 b.

(*a*) *Ibid.*

(*b*) *Armstrong* v. *Cahill* (1880), 6 L. R. Ir. 440; so in *Collins* v. *Prosser* (1823), 1 B. & C. 682, A. and B. were bound in £1,000 each "for which we bind ourselves, and each of us for himself, for the whole and entire sum of £1,000 each"; this was several, and was not avoided as to A. by the seal of B. being removed.

(*c*) *May* v. *Woodward* (1677), Freem. (K. B.) 248.

(*d*) *Robinson* v. *Walker* (1703), 1 Salk. 393; *Northumberland* (*Duke*) v. *Errington* (1794), 5 Term Rep. 522.

(*e*) *Robinson* v. *Walker*, *supra*; *Bolton* v. *Lee* (1672), 2 Lev. 56; "for themselves and either of them" (*Enys* v. *Donnithorne* (1761), 2 Burr. 1190; see *Church* v. *King*

The benefit of a joint covenant.

**844.** As regards the benefit of a covenant, the covenant may be made with the covenantees jointly, or with each of them severally; but the same covenant cannot be made with the covenantees jointly and severally, so as to leave it to the election of the covenantees whether to sue together or separately (*f*). If the covenant is joint, then, so long as all the covenantees are living, all must sue together (*g*); upon the death of any the action must be brought by the survivors, whether the breach of covenant occurred before the death (*h*) or after (*i*).

Construction affected by interests of covenantees.

**845.** The construction of a covenant with several covenantees depends, as regards its being joint or several, very largely on the interests of the covenantees in the subject-matter of the covenant. Here, as in other cases, the intention of the parties, as expressed by their words, prevails, and by clear words a covenant may be made with covenantees jointly, although their interests are several, and *vice versâ*. But the court leans against this separation between the nature of the covenant and the nature of the interest, and where the interest is joint the covenant will be joint if the words are capable of that construction; where the interests are several, the covenant will in the same manner be construed, if possible, as several (*k*).

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(1836), 2 My. & Cr. 220); "for themselves and every of them" (*May* v. *Woodward* (1677), Freem. (K.B.) 248). A bond by which three obligors bound themselves jointly and their heirs etc. respectively, and which was conditioned to be void if they or either of them, their or either of their heirs, paid, was joint and several (*Tippins* v. *Coates* (1853), 18 Beav. 401). As to the joint owners of a patent entering into joint and several covenants of title upon assigning it, see *National Society for Distribution of Electricity by Secondary Generators* v. *Gibbs*, [1900] 2 Ch. 280, C. A.

(*f*) "A man cannot bind himself to three and to each of them to make it joint and several at the election of several persons for one and the same cause" (*Slingsby's Case* (1587), 5 Co. Rep. 18 b, 19 a, Ex. Ch.).

(*g*) *Sorsbie* v. *Park* (1843), 12 M. & W. 146; *Lane* v. *Drinkwater* (1834) 1 Cr. M. & R. 599, 613.

(*h*) *Eccleston* v. *Clipsham* (1668), 1 Wms. Saund. 153.

(*i*) *Foley* v. *Addenbrooke* (1843), 4 Q. B. 197; as to payment to one of two joint obligees of a bond, see *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537; *Powell* v. *Brodhurst*, [1901] 2 Ch. 160, 164.

(*k*) *Sorsbie* v. *Park*, *supra*; *Bradburne* v. *Botfield* (1845), 14 M. & W. 559; see *per* PARKE, B., at p. 572; *Beer* v. *Beer* (1852), 12 C. B. 60, 78; see *Haddon* v. *Ayers* (1858), 1 E. & E. 118. It was formerly supposed to be a rule of law that a covenant was, as regards the covenantees, joint when their interests were joint, and *vice versâ*, notwithstanding that the words of the covenant were to the contrary (*Windham's* (*Justice*) *Case* (1589), 5 Co. Rep. 7 a, 8 a; *Eccleston* v. *Clipsham* (1668), 1 Wms. Saund. 153; *James* v. *Emery* (1818), 8 Taunt. 245, 248, Ex. Ch.; *Withers* v. *Bircham* (1824), 3 B. & C. 254). This was upon the ground that to allow separate actions when the interest was the same would charge the covenantor twice over (*Slingsby's Case* (1587), 5 Co. Rep. 18 b, 19 a, Ex. Ch.; *Lilly* v. *Hodges* (1723), 8 Mod. Rep. 166). But Mr. Preston in his edition of Sheppard's Touchstone suggested (p. 166) that the rule was only applicable when the words were ambiguous: "The correct rule is that by express words, clearly indicative of the intention, a covenant may be joint, or joint and several to, or with, the covenantors or covenantees; [but see *Bradburne* v. *Botfield*, *supra*, at p. 573; the covenant cannot be joint or several with the covenantees], notwithstanding the interests are several. So it may be several, although the interests are joint. But the implication or construction of law, when the words are ambiguous, or are left to the interpretation of the law, will be, that the words have an import corresponding to the interest, so as to be joint when the interest is

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The express language must not be contradicted, but it will be moulded to suit the interests according as they are joint or several (*l*).

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joint, and several when the interest is several; notwithstanding language which, under different circumstances, would give to the covenant a different effect." In *Sorsbie* v. *Park* (1843), 12 M. & W. 146, this gloss on the old rule was accepted, and since then the rule has been treated as one of construction only.

(*l*) *White* v. *Tyndall* (1888), 13 App. Cas. 263, *per* Lord HERSCHELL, at p. 277. This seems to represent the judgments in *Sorsbie* v. *Park*, *supra*, and *Bradburne* v. *Botfield* (1845), 14 M. & W. 559, though it is somewhat different from the rule enunciated by Mr. Preston. To enable the test of joint or several interests to be applied, the language of the covenant need not be ambiguous in the ordinary sense; it is sufficient that it is capable of being construed as several, though in form joint, and *vice versâ*. But this will not be so if it is expressly "joint" or expressly "several" (see *Bradburne* v. *Botfield*, *supra*, *per* PARKE, B., at p. 563).

The following are instances of covenants treated as joint:—Covenant for title entered into with joint grantees and each of them; in this case the covenant is at first joint, and, since this suits the joint interest, the words "each of them" are rejected (*Slingsby's Case* (1587), 5 Co. Rep. 18 b, Ex. Ch.); covenant between co-adventurers by each with the other and others of them; all have the same interest in the covenant and it is joint (*Eccleston* v. *Clipsham* (1668), 1 Wms. Saund. 153); covenant whereby musicians bound themselves in £20, each to the other jointly and severally, not to play asunder; the interest being joint, "severally" was repugnant (*Spencer* v. *Durant* (1689), Comb. 115; the actual words were *omnibus et cuilibet eorum*, S. C., 1 Show. 8; compare *Saunders* v. *Johnson* (1693), Skin. 401); covenant with L. and B. to pay to L. and B. an annuity of £30, namely, £15 to L. and £15 to B., with joint powers for securing the annuity (*Lane* v. *Drinkwater* (1834), 1 Cr. M. & R. 599); covenant between subscribers to a new corn market to pay sums set opposite their names, the covenant being by the subscribers to and with each other, and to and with trustees; the trustees sued alone; held, that the covenant was *primâ facie* joint with the subscribers and trustees, and that the trustees had no separate interest by which the covenant could be made several (*Sorsbie* v. *Park*, *supra*; see *Pugh* v. *Stringfield* (1857), 3 C. B. (N. S.) 2; (1858) 4 C. B. (N. S.) 364, where, upon a guarantee for the completion of buildings given to three mortgagees of separate properties, it was held that the interest, and also the benefit of the covenant, was joint).

The following are instances of covenants treated as several:—Where grants of different estates are made to A., B., and C. respectively, and covenants for title entered into with them and each of them (*Slingsby's Case*, *supra*); and similarly, where property is sold to purchasers in specified shares, and the vendor covenants for title with each of them (*Mills* v. *Ladbroke* (1844), 7 Man. & G. 218); where collectors of rents for A. and B. covenant with A. and B. to pay a moiety to each of them (*Lilly* v. *Hodges* (1723), 8 Mod. Rep. 166); where vendors are entitled in specified shares, a covenant with them and each of them to pay the purchase-money (*James* v. *Emery* (1818), 8 Taunt. 245, Ex. Ch.); where there are vendors of different lands at separate prices to one purchaser, and the purchaser by the same deed covenants with each to complete the purchase (*Poole* v. *Hill* (1840), 6 M. & W. 835); where under an agreement purchase-money (*Tippet* v. *Hawkey* (1689), 3 Mod. Rep. 263), or interest on purchase-money, is to be paid to one vendor only (*Keightley* v. *Watson* (1849), 3 Exch. 716); where separate annuities had been granted, and a surety covenanted with the annuitants that, on default by the grantor, he would pay to them the annuities (*Withers* v. *Bircham* (1824), 3 B. & C. 254); covenant by a ship's captain with part owners to pay moneys to them, "and to their and every of their several and respective heirs etc." in specified shares (*Servante* v. *James* (1829), 10 B. & C. 410). A covenant entered into with partners jointly for the protection of the partnership business may be enforceable by them severally after dissolution of the partnership (*Palmer* v. *Mallett* (1887), 36 Ch. D. 411, C. A.).

A covenant with two jointly for payment of a sum of money confers a joint legal interest, and the covenant is construed as joint notwithstanding that only

**846.** Where an agreement contains covenants on the part of each party towards the other the question arises whether one party can sue on the covenants in his own favour without alleging and proving either that he has performed, or that he has offered to perform, those on his part. In this respect covenants are classified as follows:—(1) Such as are mutual and independent, and here either party may recover damages from the other for a breach of the covenants in his favour, and it is no defence that he has not performed, or even that he has committed a breach of, those on his part; (2) such as are conditional and dependent, in which the performance of one depends on the prior performance of the other; consequently, until the one which is the condition has been performed, no action will lie on the other which is dependent (*m*); (3) such as are mutually conditional—that is, covenants which are to be performed at the same time, and here, if one party was ready and offered to perform his own part, and the other has neglected or refused to perform his, the former may maintain an action against the latter, though it is not certain that either was obliged to perform the first act (*n*). But while these three cases are distinguishable, the second and third are frequently placed together, and the question is treated as being whether the covenants are independent, or whether they or one of them are or is dependent.

Covenants are:—

Mutual and independent;

Conditional and dependent;

Mutual conditions.

**847.** Whether covenants are to be taken as dependent or independent is to be decided in accordance with the intention of the parties as expressed in the instrument. For this purpose no technical words are necessary (*o*); and, indeed, to such intention, when once discovered, all technical forms of expression must give way (*p*); the intention is to be collected from the instrument, and from the circumstances, legally admissible in evidence, with reference to which it is to be construed (*q*). When the parties have

Covenants are dependent or otherwise according to expressed intention.

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one is beneficially interested (*Rolls* v. *Yate* (1610), Yelv. 177; *Anderson* v. *Martindale* (1801), 1 East, 497; *Hopkinson* v. *Lee* (1845), 6 Q. B. 964). And where in a lease by several lessors the lessee enters into a covenant to repair which is capable of being treated as joint it will be so treated, notwithstanding that one or more of the lessors have no interest in the land (*Southcote* v. *Hoare* (1810), 3 Taunt. 87; *Wakefield* v. *Brown* (1846), 9 Q. B. 209, 223), or that the lessors are tenants in common; though their interests in the land are separate, they have a joint interest in the repairs (*Foley* v. *Addenbrooke* (1843), 4 Q. B. 197; *Bradburne* v. *Botfield* (1845), 14 M. & W. 559). This is so although the lessors demise "according to their several estates," and the lessees covenant with them "and their respective heirs and assigns" (*Thompson* v. *Hakewill* (1865), 19 C. B. (N. S.) 713; see p. 726). Upon a demise of a reversion on a lease to tenants in common, each can sue on the covenants in the lease without joining the others (*Roberts* v. *Holland*, [1893] 1 Q. B. 665).

(*m*) See *Ughtred's Case* (1591), 7 Co. Rep. 9 b, 10 b. But the covenant which is a condition as regards the other is itself independent (see p. 490, *post*).

(*n*) With verbal alterations (*per* Lord MANSFIELD in *Kingston* v. *Preston* (1773), stated in *Jones* v. *Barkley* (1781), 2 Doug. (K. B.) 684, at p. 690).

(*o*) *Hotham* v. *East India Co.* (1787), 1 Term Rep. 638, at p. 645.

(*p*) *Stavers* v. *Curling* (1836), 3 Bing. (N. C.) 355, *per* TINDAL, C.J., at p. 368; *Porter* v. *Shephard* (1796), 6 Term Rep. 665, *per* Lord KENYON, C.J., at p. 668; *Roberts* v. *Brett* (1865), 11 H. L. Cas. 337, at p. 354.

(*q*) *Graves* v. *Legg* (1854), 9 Exch. 709, *per* PARKE, B., at p. 716; *Bettini* v. *Gye* (1876), 1 Q. B. D. 183, at p. 187; see *Kingston* v. *Preston*, *supra*.

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expressly provided that one covenant is to be treated as a condition, effect will be given to this provision (*r*), unless, indeed, it has to be rejected as being clearly repugnant to the intention appearing on the whole instrument (*s*); or, perhaps, unless a stipulation, though expressed to be conditional, is not in its nature a condition precedent to performance on the other side (*t*).

Rules of construction depending on :— Order of time ; Nature of covenants.

**848.** The question whether covenants are dependent or independent does not depend upon the order in which they occur in the deed, but usually either upon the order of time in which the intent of the transaction requires their performance (*a*), or upon the nature of the contract and the acts to be performed by the contracting parties (*b*); and in regard to these two considerations—order of performance in point of time and the nature of the contract—certain rules have been recognised. The rules, however, do not absolutely determine the dependence or independence of covenants in all cases; they merely furnish a guide to the discovery of the intention of the parties (*c*). And in general covenants are to be treated as independent rather than as conditions precedent, especially where some benefit has been derived by the covenantor (*d*).

A covenant fixed to be performed first is itself independent ;

**849.** As regards order of performance in point of time :—

(1) If there are mutual covenants between A. and B., and A.'s covenant has to be performed on a specified day, while B.'s covenant has to be performed on a later day, A.'s covenant is independent of B.'s covenant. A. must perform it at the fixed date, and the consideration for the performance of it is not the performance of B.'s covenant, but B.'s promise to perform it. Consequently A. must rely on his remedy against B., and cannot excuse his own non-performance on the ground of B.'s failure to perform his covenant (*e*).

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(*r*) *London Guarantee Co.* v. *Fearnley* (1880), 5 App. Cas. 911, at p. 919.

(*s*) "The clearest words of condition must yield to the prominent intention of the parties as gathered from the whole instrument" (*London Gas-Light Co.* v. *Chelsea Vestry* (1860), 8 C. B. (N. S.) 215, *per* BYLES, J., at p. 239).

(*t*) See the dissentient judgment of Lord SELBORNE, L.C., in *London Guarantee Co.* v. *Fearnley*, *supra*, at p. 920.

(*a*) *Kingston* v. *Preston* (1773), cited 2 Doug. (K. B.) 690.

(*b*) *Hotham* v. *East India Co.* (1787), 1 Term Rep. 638, at p. 645.

(*c*) *Roberts* v. *Brett* (1865), 11 H. L. Cas. 337, *per* Lord CHELMSFORD, at p. 354.

(*d*) *Newson* v. *Smythies* (1858), 3 H. & N. 840, *per* POLLOCK, C.B., at p. 843.

(*e*) Rules (1) and (2) correspond to the first two rules in the notes to *Pordage* v. *Cole* (1669), 1 Wms. Saund. 319 l, except that the parts of the first of those rules enclosed in brackets (*infra*) are reserved to be the subject of rule (3) in the text:—"1. If a day be appointed for payment of money . . . or for doing any other act, and the day is to happen, [or may happen] before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act, before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent: [and so it is where no time is fixed for the performance of that which is the consideration of the money or other act]. . . But, 2. When a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance." The rules are taken from the judgment of HOLT, C.J., in *Thorpe* v. *Thorpe* (1701), 1 Salk. 171; but when the parts in brackets of the first rule are removed,

(2) In the same circumstances A.'s covenant is a condition precedent to the performance of B.'s, and the latter covenant is dependent (*f*). The liability on B.'s covenant does not arise unless A.'s covenant is performed. And generally where one covenant is to be performed before the other it is a condition precedent (*g*); and conversely, if the time of performance for one covenant is not fixed, but it is stated to be a condition precedent, this *primâ facie* limits the time of its performance to the period antecedent to the date of the other covenant (*h*), since a later performance cannot be a condition precedent to an earlier (*i*).

but is a condition precedent, as regards the later covenant, which is dependent.

(3) If while the date of performance of A.'s covenant is fixed, that of B.'s covenant is not fixed, but B.'s covenant may have to be performed after A.'s covenant, A.'s covenant is still independent (*j*).

A covenant fixed in date, if the other covenant may have to be performed later, is independent; and such other covenant is independent also.

(4) In the circumstances referred to in (3) B.'s covenant is also independent. Since neither covenant is necessarily earlier in date,

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the second is seen to be merely supplementary to the first, and they are both included in the statement that, when the performances are to take place at successive dates, the earlier covenant is independent as regards the later, but is itself a condition, and the later covenant is dependent upon it.

Instances where the performance of one covenant was fixed definitely before that of the other, and was therefore independent of that other, are:—*Tolcelser's Case* (1374), stated in 12 Mod. Rep. p. 461 (covenant by Pool to serve Tolcelser with three esquires in the French wars, and covenant by Tolcelser to pay him so much money, as to twenty marks before they went to France; Pool could sue for the twenty marks, although the service had not been rendered); *Russen* v. *Coleby* (1733), 7 Mod. Rep. 236 (covenant by A. to pay seamen their wages yearly, and by B. in consideration thereof to pay A. £42 every month; A. was allowed to sue for the £42 without alleging payment of the wages); *Terry* v. *Duntze* (1795), 2 Hy. Bl. 389 (A. covenants to build a house by a certain day, and B. to pay by instalments as the building proceeds); *Walker* v. *Harris* (1793), 1 Anst. 245 (covenant by A. to take B. as partner from and after 29th September; by B. to pay £300 on or before that day); *Dicker* v. *Jackson* (1848), 6 C. B. 103; *Yates* v. *Gardiner* (1851), 20 L. J. (EX.) 327; *Weston* v. *Collins* (1865), 34 L. J. (CH.) 353 (all cases where date for payment of purchase-money was fixed, but not for completion otherwise); *Workman, Clark & Co.* v. *Lloyd Brazileño*, [1908] 1 K. B. 968 (agreement to build steamer, price to be paid in instalments as work proceeded). And see *Judson* v. *Bowden* (1847), 1 Exch. 162, where one covenant was to be performed partly before and partly after the other, and was therefore not a condition precedent.

Instances where performance of the earlier covenant was a condition precedent to suing on the later are:—Where work is to be done, and then payment is to be made (see cases cited in *Morton* v. *Lamb* (1797), 7 Term Rep. 125, at p. 130); *Feversham* (*Earl*) v. *Watson* (1680), Cas. *temp.* Finch, 445 (covenant in marriage settlement by husband to be performed before covenant by wife's father); compare *Roberts* v. *Brett* (1865), 11 H. L. Cas. 337, where the performance of an agreement was to be secured by each party's bond, and the giving of the bond was a condition precedent to suing on the contract.

(*f*) See note (*e*), p. 490, *ante*.

(*g*) *Neale* v. *Ratcliff* (1850), 15 Q. B. 916 (lessee's covenant to repair a house, "the same being first put in repair" by the lessor; the latter is a condition precedent); see *Peeters* v. *Opie* (1671), 2 Wms. Saund. 346, 350 (payment to be made for work done).

(*h*) *London Guarantee Co.* v. *Fearnley* (1880), 5 App. Cas. 911, *per* Lord WATSON, at p. 920.

(*i*) *Ibid.*, *per* Lord BLACKBURN, at p. 916.

(*j*) This represents the effect of the first rule in the notes to *Pordage* v. *Cole* (1669), 1 Wms. Saund. 319 l, so far as not stated in rule (1) in the text. The separate statement of this part of the rule makes the relation of the first two rules in *Pordage* v. *Cole* clearer, and leads up to rule (4) in the text.

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neither is a condition precedent. The two covenants are mutual and independent; and either party relies not on performance by, but on his remedy against, the other (*k*).

Simultaneous covenants are mutually dependent.

(5) Where the covenants are to be performed at the same time, and each is the consideration for the other, they are mutually dependent; each is a condition precedent to the performance of the other, and neither party can maintain an action without alleging and proving that he has performed, or was ready and willing to perform, his own covenant (*l*). Here the consideration moving to each party is the performance by, not the promise of, the other.

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Instances where the date of one covenant only was fixed, and the other, since it might be performed later, was not a condition precedent, so that the former was independent, are :—*Pordage* v. *Cole* (1669), 1 Wms. Saund. 319 l (agreement between A. and B. that B. shall pay A. a sum of money for his lands on a particular day; the conveyance by A. is not a condition of suing for the money); *Campbell* v. *Jones* (1796), 6 Term Rep. 570 (covenant by A. to teach B. with all possible expedition a specified art, and by B. to pay £250 on a fixed date); *Mattock* v. *Kinglake* (1839), 10 Ad. & El. 50 (covenant by A. on a purchase to pay the purchase-money on a fixed day, no day being fixed for conveyance) ; and see to the same effect *Wilks* v. *Smith* (1842), 10 M. & W. 355, 360, and *Sibthorp* v. *Brunel* (1849), 3 Exch. 826; *Thames Haven Dock Co.* v. *Brymer* (1850), 5 Exch. 696, Ex. Ch (covenant to deduce title held to be a condition precedent to preparation of conveyance); *Christie* v. *Borelly* (1860), 7 C. B. (N. S.) 561 (guarantee of payment of bills at maturity in consideration of guarantee of payments not fixed as to date; and see *Seeger* v. *Duthie* (1860), 8 C. B. (N. S.) 45).

(*k*) This is not stated in the rules in the notes to *Pordage* v. *Cole*, *supra*, but is necessary in order to show completely the relation of the two covenants (see *Campbell* v. *Jones*, *supra*; *Jeston* v. *Key* (1871), 6 Ch. App. 610).

(*l*) This is the fifth rule in the notes to *Pordage* v. *Cole*, *supra*: "5. Where two acts are to be done at the same time, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without showing a performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale" (see *Glazebrook* v. *Woodrow* (1799), 8 Term Rep. 366, p. 374). The following cases illustrate the rule:—*Kingston* v. *Preston* (1773), cited 2 Doug. (K. B.) 689 (covenant by A. to give up his business to B., and by B. to procure security for the price "at or before delivery of the deeds"); *Large* v. *Cheshire* (1671), 1 Vent. 147 (C. covenants to pay L. a sum of money, L. "making him" a sufficient estate in certain lands); *Callonel* v. *Briggs* (1703), 1 Salk. 112 (A. agreed to pay B. so much money for stock six months after the bargain, B. transferring the stock); see *Stapleton* v. *Shelburne* (*Lord*) (1725), 1 Bro. Parl. Cas. 215 ; *Goodisson* v. *Nunn* (1792), 4 Term Rep. 761 ; *Morton* v. *Lamb* (1797), 7 Term Rep. 125 (agreement by A. in consideration that B. had bought corn at a certain price, to deliver it within one month); *Glazebrook* v. *Woodrow*, *supra* (covenant by A. to sell a schoolhouse to B., and convey on or before 1st August, and by B. to pay £120 on or before 1st August; conveyance and payment were mutual conditions, notwithstanding that possession had been given by A., the conveyance being the material part); *Marsden* v. *Moore* (1859), 4 H. & N. 500 (covenant for payment of £250 for purchase of share in mining sett); see, too, *Heard* v. *Wadham* (1801), 1 East, 619, where payment and conveyance were to be simultaneous; and *Atkinson* v. *Smith* (1845), 14 M. & W. 695, as to sale where goods passed on both sides.

It is in general sufficient that the party suing alleges readiness to perform his own covenant (*Turner* v. *Goodwin* (1714), 10 Mod. Rep. 153, 189, 222); and a vendor of land need not, in an action against the purchaser, aver tender of a conveyance; it is sufficient to allege that he has always been ready and willing to execute a conveyance, it being the purchaser's duty to prepare and tender the conveyance (*Poole* v. *Hill* (1840), 6 M. & W. 835; *Laird* v. *Pim* (1841), 7

**850.** As regards the nature of the contract:—

(1) If the covenants on either side form the entire consideration for each other, they are mutually dependent; each is a condition precedent, and neither party can sue without alleging that he has performed his covenant, or that he is ready and willing to perform it (*m*).

Covenants forming entire consideration for each other are mutually dependent.

(2) But if the covenant by A. is part only of the consideration for the other covenant by B., and the remainder of that consideration has been performed by A. (such remainder being a substantial part of the entire consideration), then A.'s covenant, although originally a condition precedent, ceases to be so, and B.'s covenant is treated as an independent covenant. Consequently A. can then sue for a breach of B.'s covenant without alleging performance of his own covenant (*n*).

Covenant which is part only of the consideration ceases to be a condition precedent upon the rest of the consideration being performed.

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M. & W. 474); see as to other contracts, *Giles* v. *Giles* (1846), 9 Q. B. 164; *Doogood* v. *Rose* (1850), 9 C. B. 132.

(*m*) This is the fourth rule in the notes to *Pordage* v. *Cole* (1669), 1 Wms. Saund. 319 l; "4. Where the mutual covenants go to the whole consideration on both sides, they are mutual conditions and performance must be averred" (see *Oxford* v. *Provand* (1868), L. R. 2 P. C. 135, at p. 156). Accordingly, where a vendor had so changed the property by cutting down timber that he could not properly perform his covenant, he could not sue for the purchase-money (*St. Albans (Duke)* v. *Shore* (1789), 1 Hy. Bl. 270); and where a master had disabled himself from fulfilling his duty to teach his apprentice, he could not sue for desertion (*Ellen* v. *Topp* (1851), 6 Exch. 424). And where mutual considerations are indivisible, each side must perform the whole of his obligation to enable him to sue (*Chanter* v. *Leese* (1839), 5 M. & W. 698, Ex. Ch. (licence to use several connected patents in consideration of payments to the various owners, all being parties to the agreement; failure of title to one patent disabled the owner from suing); *Neale* v. *Ratcliff* (1850), 15 Q. B. 916 (a covenant to repair cannot be divided unless it relates to distinct buildings)). Where a stipulation is introduced as a condition, and not as a covenant, it will be a condition precedent if it is of great importance to, or goes to the root of, the contract (see *Bradford* v. *Williams* (1872), L. R. 7 Exch. 259; *Grafton* v. *Eastern Counties Rail. Co.* (1853), 8 Exch. 699 (goods supplied to be to the satisfaction of defendant company's inspector); *Graves* v. *Legg* (1854), 9 Exch. 709 (agreement for sale of wool, the names of the vessels to be declared as soon as wool shipped); *Bank of China, Japan and the Straits* v. *American Trading Co.*, [1894] A. C. 266, P. C. (agreement between bankers and brokers in reference to payment for goods in silver, the goods to be financed through the bankers; such financing was a condition precedent); *Poussard* v. *Spiers* (1876), 1 Q. B. D. 410 (opera singer disabled at commencement of engagement)); but a condition to be present at rehearsal was not a condition precedent (*Bettini* v. *Gye* (1876), 1 Q. B. D. 183). As to arbitration being a condition precedent, see title ARBITRATION, Vol. I., p. 445; as to conditions in charterparties, see title SHIPPING AND NAVIGATION; as to covenants in leases, see title LANDLORD AND TENANT.

(*n*) See the third rule in the notes to *Pordage* v. *Cole*, *supra*: "3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration." The language of the rule is open to criticism, but, taking the rule with the authorities, the meaning is sufficiently clear and is as stated in the text. A.'s covenant, so long as it formed part of an entire unpaid consideration, was, in common with the rest of the consideration, a condition precedent to B.'s covenant, and B.'s covenant was dependent. It is only when the rest of the consideration has been paid that A.'s covenant ceases to be a condition precedent; and for this purpose the residue of consideration which has been paid must be a substantial part of the whole (*Ellen* v. *Topp*, *supra*). It is then no longer competent for B. to insist on

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The application of this rule in favour of A., who has performed the substantial part of his consideration, will be facilitated if one of his covenants is to be performed after B.'s covenant (*o*). If, however, the partial performance on one side is exactly compensated by partial performance on the other, the rule does not apply (*p*).

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the non-performance of that which was originally a condition precedent, and his covenant becomes independent. This is more correct than to say that A.'s covenant was never a condition precedent at all (*Graves* v. *Legg* (1854), 9 Exch. 709, p. 717; *White* v. *Beeton* (1861), 7 H. & N. 42, p. 50). And the reason is that since B. has had part of the consideration for which he entered into the agreement, it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing anything for it (*Campbell* v. *Jones* (1796), 6 Term Rep. 570). "Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration" (notes to *Pordage* v. *Cole* (1669), 1 Wms. Saund. 319 l; *Carter* v. *Scargill* (1875), L. R. 10 Q. B. 564).

The rule was established by *Boone* v. *Eyre* (1777), 1 Hy. Bl. 273, n. (a), where A. conveyed to B. the equity of redemption of an estate in the West Indies, with the negroes upon it, in consideration of £500 and a life annuity of £160; A. covenanted for title, and B. covenanted that, A. well and truly performing all and everything therein contained on his part, he would pay the annuity. A. having executed part of the consideration on his side by conveying the land, his want of title to the negroes was not a bar to his action for the annuity; see *Ritchie* v. *Atkinson* (1808), 10 East, 295, *per* Lord ELLENBOROUGH, C.J., at p. 306; *Havelock* v. *Geddes*, (1809), 10 East, 555, at p. 564; *Fothergill* v. *Walton* (1818), 8 Taunt. 576, *per* DALLAS, C.J., at p. 582; *Stavers* v. *Curling* (1836), 3 Bing. (N. C.) 355, at p. 368; *Seeger* v. *Duthie* (1860), 8 C. B. (N. S.) 45, at p. 71. Examples of the rule are furnished by *Campbell* v. *Jones* (1796), 6 Term Rep. 570 (C. covenants to teach D. a certain art and to permit him to use a certain patent, and D. to pay C. money on a fixed day; C. having allowed the use of the patent can sue for the money, although he has not taught the art); *Carpenter* v. *Cresswell* (1827), 4 Bing. 409 (A. assigns a business and covenants not to interfere in it; B. to pay an annuity; the business being assigned, the covenant against interference is not a condition precedent to payment of the annuity); where mutual covenants are entered into in a marriage settlement and the marriage takes place (*Lloyd* v. *Lloyd* (1837), 2 My. & Cr. 192); where one party is to supply goods, and the other to pay an agreed price, the supply of all the goods is not a condition precedent (*Macintosh* v. *Midland Counties Rail. Co.* (1845), 14 M. & W. 548; *London Gas-Light Co.* v. *Chelsea Vestry* (1860), 8 C. B. (N. S.) 215 (in spite of words of condition); *Eastern Counties Rail. Co.* v. *Philipson* (1855), 16 C. B. 2 (agreement for defendants to supply and plaintiffs to purchase all coke required; a stipulation against plaintiffs' getting coke elsewhere is not a condition precedent); and see *Wilkinson* v. *Clements* (1872), 8 Ch. App. 96, as to grant of separate leases under building agreement as houses are finished).

To the same principle may be referred the rule that in apprenticeship deeds the covenants are independent, and misconduct on the part of the apprentice does not bar his action against the master for breach of covenant (*Winstone* v. *Linn* (1823), 1 B. & C. 460; *Phillips* v. *Clift* (1859), 4 H. & N. 168). But desertion by the apprentice (*Hughes* v. *Humphreys* (1827), 6 B. & C. 680; see *Branch* v. *Ewington* (1780), 2 Doug. (K. B.) 518), or serious misconduct (*Westwick* v. *Theodor* (1875), L. R. 10 Q. B. 224; *Learoyd* v. *Brook*, [1891] 1 Q. B. 431), or refusal to be taught (*Raymond* v. *Minton* (1866), L. R. 1 Exch. 244), excuses the master; and he need not return any part of the premium, even though the apprentice was willing to return and the master refused to take him back (*Cuff* v. *Brown* (1818), 5 Price, 297).

(*o*) *Newson* v. *Smythies* (1858), 3 H. & N. 840. The case is within rule (1), p. 490, *ante*, also, and none of A.'s covenants are conditions precedent.

(*p*) *General Bill Posting Co.* v. *Atkinson*, [1909] A. C. 118 (engagement of servant at a salary, with a covenant in restraint of trading after the termination of the engagement; the salary and the service are equivalent to each other; this leaves the employment and the restriction mutually conditional, and a wrongful dismissal releases from the restriction).

(3) Where the opposite covenants are not given by way of mutual consideration, or where they have no relation to each other, they are independent. The damages sustained by breach of one may be no measure of the damages sustained by breach of the other (*q*), and the parties are left to their remedies by action. Thus, covenants on either side to give security for performing an agreement are independent as regards each other, though as regards the actual obligations of the agreement on either side they may be conditions precedent (*a*).

Unrelated covenants are independent.

SUB-SECT. 7.—*Covenants with a Penalty* (*b*).

**851.** A contract may specify a sum as being payable upon breach, and, if it contains several stipulations, the sum may be expressed to be payable on breach either of one or more specified stipulations, or of any of the stipulations; and it is usual to describe such sum as either a penalty or liquidated damages (*c*). But although regard must be had to the description in the contract (*d*), yet it is not conclusive; and if upon the whole instrument it appears that the sum is a penal sum, it will be so treated and *vice versâ* (*e*).

Liquidated damages and penalties.

**852.** When there is a covenant to do or not to do a specified thing, and a sum, whether a penalty or liquidated damages, is fixed to be paid on breach of the covenant, the covenantor has not in general the option of breaking the covenant upon payment of the fixed sum (*f*). He is bound by the covenant, and, if positive,

Whether covenantor can elect to break covenant.

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(*q*) *Thomas* v. *Cadwallader* (1744), Willes, 496; see *Warren* v. *Arthur* (1682), 2 Mod. Rep. 317 (covenant by lessee that lessor may fell trees, and by lessor to repair the hedges where they grow); *Chitty* v. *Bray* (1883), 48 L. T. 860 (restrictive covenants affecting adjoining plots of land, but differing as to object and importance, treated as independent); *Gibson* v. *Goldsmid* (1854), 5 De G. M. & G. 757, C. A. (covenants as to transfer of property and indemnity in a deed of dissolution of partnership); *Cannock* v. *Jones* (1849), 3 Exch. 233 (covenants by lessor and lessee to repair separate parts of the premises); covenants between the husband and the trustee for the wife in a separation deed (*Fearon* v. *Aylesford* (*Earl*) (1884), 12 Q. B. D. 539).

(*a*) *Roberts* v. *Brett* (1865), 11 H. L. Cas. 337.

(*b*) See also title DAMAGES, p. 328, *ante*.

(*c*) See *Lowe* v. *Peers* (1768), 4 Burr. 2225, 2228. As to contracts by local authorities specifying a penalty, see *Soothill Upper Urban Council* v. *Wakefield Rural Council*, [1905] 2 Ch. 516, C. A.

(*d*) *Willson* v. *Love*, [1896] 1 Q. B. 626, C. A., *per* Lord ESHER, M.R., at p. 630: "No case, I think, decides that the term used by the parties themselves is to be altogether disregarded . . . where the parties themselves call the sum made payable a 'penalty,' the onus lies on those who seek to show that it is to be payable as liquidated damages"; but much reliance is not to be placed on the description (*Law* v. *Redditch Local Board*, [1891] 1 Q. B. 127, 131, C. A.; *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo-y Castaneda* (*Don Jose Ramos*), [1905] A. C. 6, 9). And see title DAMAGES, p. 328, *ante*.

(*e*) *Betts* v. *Burch* (1859), 4 H. & N. 506, *per* BRAMWELL, B., at p. 511; and see this case as to the origin of the above rule of construction; *Sainter* v. *Ferguson* (1849), 7 C. B. 727.

(*f*) See *French* v. *Macale* (1842), 2 Dr. & War. 269, *per* SUGDEN, L.C., at pp. 274, 275: "The general rule of equity is, that if a thing be agreed to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. . . . So if a man covenant to abstain from doing a certain act, and agree that, if he do it, he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act, and, just as in the converse case,

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it will be enforced in an action for specific performance (where this is the appropriate remedy) (*g*), and, if negative, it will be enforced by injunction (*h*). But the covenantee cannot get both damages and an injunction; he must elect which of the two remedies he will take (*i*). The question, however, is one of construction (*k*), and if the intention of the covenant is that the covenantor shall be at liberty to do the prohibited act on payment of the penalty or stipulated sum, effect will be given to it accordingly (*l*); and this will usually be the case where the penalty is in the nature of a recurring remuneration to the covenantee, as in the case of an increased rent reserved for breach of a covenant not to plough up pasture land (*a*).

SUB-SECT. 8.—*Covenants Operating by way of Assignment or Release.*

Assignment of after-acquired property.

**853.** A contract for valuable consideration, by which it is agreed to make a present transfer of property, if it is one of which a court of equity will decree specific performance, passes at once the beneficial interest; or if the property does not then belong to the covenantor, the beneficial interest passes as soon as he acquires the

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he cannot elect to break his engagement by paying for his violation of the contract"; *Chilliner* v. *Chilliner* (1754), 2 Ves. Sen. 528; see *Prebble* v. *Boghurst* (1818), 1 Swan. 309, n. (3); Fry, Specific Performance, 4th ed., Part I., ch. iii.

(*g*) As in cases of bonds to secure an agreement for settlement of property on marriage (*Nandike* v. *Wilkes* (1716), Gilb. (CH.) 114; *Chilliner* v. *Chilliner*, *supra*; *Prebble* v. *Boghurst*, *supra*; *Roper* v. *Bartholomew* (1823), 12 Price, 797); bond in consideration of marriage to leave property by will (*Logan* v. *Wienholt* (1833), 1 Cl. & Fin. 611, H. L.); bond to secure an agreement to grant a lease (*Butler* v. *Powis* (1845), 2 Coll. 156); penalty in a contract for purchase of land (*Howard* v. *Hopkyns* (1742), 2 Atk. 371).

(*h*) As where a covenant in restraint of trade is secured by a penalty or liquidated damages (*Hardy* v. *Martin* (1783), 1 Cox, Eq. Cas. 26; *Fox* v. *Scard* (1863), 33 Beav. 327; *National Provincial Bank of England* v. *Marshall* (1888), 40 Ch. D. 112, C. A.; see *Barret* v. *Blagrave* (1800), 5 Ves. 555; *Bird* v. *Lake* (1863), 1 Hem. & M. 111; *Howard* v. *Woodward* (1864), 34 L. J. (CH.) 47; *Jones* v. *Heavens* (1877), 4 Ch. D. 636); similarly as to restrictive covenants affecting land (*Coles* v. *Sims* (1854), 5 De G. M. & G. 1, C. A.).

(*i*) *Sainter* v. *Ferguson* (1849), 1 Mac. & G. 286; *Carnes* v. *Nesbitt* (1862), 7 H. & N. 778; *Fox* v. *Scard*, *supra*; *Howard* v. *Woodward*, *supra*; *Young* v. *Chalkley* (1867), 16 L. T. 286; *General Accident Assurance Corporation* v. *Noel*, [1902] 1 K. B. 377.

(*k*) See *Roper* v. *Bartholomew*, *supra*, at p. 821.

(*l*) *French* v. *Macale* (1842), 2 Dr. & War. 269, 284.

(*a*) *Woodward* v. *Gyles* (1690), 2 Vern. 119; *Legh* v. *Lillie* (1860), 6 H. & N. 165; see *Rolfe* v. *Peterson* (1772), 2 Bro. Parl. Cas. 436; and compare *French* v. *Macale*, *supra*, where only a single sum per acre was reserved for breach of a covenant not to burn. But where an increased rent was reserved upon breach of covenant against offensive trades, with a clause of re-entry on breach of covenant, this did not give the lessee the right to commit a breach, and the lessor had the option of re-entering or requiring payment of the increased rent (*Weston* v. *Metropolitan Asylum District* (*Managers*) (1882), 9 Q. B. D. 404, C. A.); compare *Hanbury* v. *Cundy* (1887), 58 L. T. 155 (lease of tied house with proviso for reduction of rent so long as the tie was observed. The lessee had not the option of breaking the tie and paying the full rent). Compare *Magrane* v. *Archbold* (1813), 1 Dow, 107, H. L. (covenant for perpetual renewal of a lease, subject to a penalty); and as to the reservation of penal rents, see titles AGRICULTURE, Vol. I., p. 249; LANDLORD AND TENANT.

property (*b*). Similarly, a covenant to charge property when acquired operates as a charge on the property so soon as acquired (*c*). An assignment for valuable consideration of property to be afterwards acquired by the assignor operates as a covenant by the assignor to assign it when acquired, and on acquisition the beneficial interest passes accordingly (*d*). And, provided the property is ascertainable with certainty, it is no objection that it is described in general terms (*e*). A clause in a building agreement that building materials brought on the land shall become the property of the landowner does not, however, operate merely as an assignment. On the materials being brought on the land the legal interest in them passes by virtue of the contract (*f*).

Release.

**854.** A general covenant by a creditor with his debtor not to sue at any time will operate as a release of the debt. This is in order to avoid circuity of action, since the damages in an action on the covenant would be equal to the debt (*g*). But a covenant not to sue before a stated time does not operate as a release; it only gives the debtor a remedy on the covenant if he is sued before the time (*h*). Moreover, a general covenant not to sue does not release the debt for all purposes, and the debt may be kept alive as between persons claiming under the debtor (*i*). And where the parties to the covenant are different from the persons interested as debtors or creditors in the debt, then the principle of avoiding circuity of action does not apply, and the covenant does not operate as a release (*k*).

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(*b*) *Holroyd* v. *Marshall* (1862), 10 H. L. Cas. 191; compare Shep. Touch. 162; and see p. 377, *ante*.

(*c*) *Metcalfe* v. *York* (*Archbishop*) (1836), 1 My. & Cr. 547; but not in favour of a volunteer, since the contract will not be specifically enforced (*Re Lucan* (*Earl*), *Hardinge* v. *Cobden* (1890), 45 Ch. D. 470).

(*d*) *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342, C. A.

(*e*) *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523 (assignment of all book debts acquired during the continuance of the security; approving *Re Clarke, Coombe* v. *Carter* (1887), 36 Ch. D. 348, C. A., and overruling *Belding* v. *Read* (1865), 3 H. & C. 955 (personal effects to be thereafter upon a house), and *Re D'Epineuil* (*Count*) (2), *Tadman* v. *D'Epineuil* (1882), 20 Ch. D. 758 (a charge on all "present and future personalty"); see *Re Kelcey, Tyson* v. *Kelcey*, [1899] 2 Ch. 530). As to covenants in marriage settlements for assignment of after-acquired property, see *Lewis* v. *Madocks* (1803), 8 Ves. 150; *Hardey* v. *Green* (1849), 12 Beav. 182; *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, 777, C. A.; and see title SETTLEMENTS. If the general words are too vague for the contract to be enforced, then it is divisible, and can be enforced as to the property sufficiently described (*Clements* v. *Matthews* (1883), 11 Q. B. D. 808, C. A.; *Re Clarke, Coombe* v. *Carter, supra; Re Turcan* (1888), 40 Ch. D. 5, C. A.).

(*f*) *Reeves* v. *Barlow* (1884), 12 Q. B. D. 436, C. A.; *Hart* v. *Porthgain Harbour Co., Ltd.*, [1903] 1 Ch. 690; compare *Re Keen and Keen, Ex parte Collins*, [1902] 1 K. B. 555; *Re Wiebking, Ex parte Ward*, [1902] 1 K. B. 713; *Morris* v. *Delobbel-Flipo*, [1892] 2 Ch. 352 (charge in favour of an agent on stock in his hands).

(*g*) *Ford* v. *Beech* (1848), 11 Q. B. 852, 871, Ex. Ch.; *Smith* v. *Mapleback* (1786), 1 Term Rep. 441, *per* BULLER, J., at p. 446; notes to *Fowell* v. *Forrest* (1669), 2 Wms. Saund. 47.

(*h*) *Deux* v. *Jefferies* (1594), Cro. Eliz. 352; *Thimbleby* v. *Barron* (1838), 3 M. & W. 210; see *Morley* v. *Frear* (1830), 6 Bing. 547.

(*i*) *Ledger* v. *Stanton* (1862), 2 John. & H. 687.

(*k*) Thus a covenant with one of two joint (*Hutton* v. *Eyre* (1815), 6 Taunt. 289), or joint and several (*Lacy* v. *Kinaston* (1701), 1 Ld. Raym. 688, 690; *Dean* v.

SECT. 10. Instruments to which Foreigners are Parties.

SECT. 10.—*Instruments to which Foreigners are Parties.*

**855.** The principles which determine the construction of instruments to which foreigners are parties fall under the head of CONFLICT OF LAWS, and are there stated. The parties are at liberty to determine for themselves the law which shall govern the transaction, and their intention in this respect is a matter of the construction of the contract, read by the light of the subject-matter and the surrounding circumstances. If the intention cannot be gathered from the contract, then the general rule is that the law of the country where the contract is made governs the nature of the obligation and the interpretation of it (*l*). But as regards conveyances and assignments of real or personal property, the special rules which determine the validity and effect of the document must be considered (*m*).

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*Newhall* (1799), 8 Term Rep. 168), debtors not to sue him does not prevent an action being brought for the debt against the other debtor (compare *Salmon* v. *Webb* (1852), 3 H. L. Cas. 510). With an actual release it is different, and a release to one of two joint, or joint and several, debtors releases both (Co. Litt. 232 a; *Cheetham* v. *Ward* (1797), 1 Bos. & P. 630; *Nicholson* v. *Revill* (1836), 4 Ad. & El. 675, 683); but not a release to one of two several debtors (*Collins* v. *Prosser* (1823), 1 B. & C. 682). Where the release is accompanied by a reservation of rights against the co-debtor, its effect as a release is avoided by treating it as a covenant not to sue (*Solly* v. *Forbes* (1820), 2 Brod. & Bing. 38; see *Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9; *Keyes* v. *Elkins* (1864), 5 B. & S. 240); and see title CONTRACT, Vol. VII., p. 455. A covenant by one of several joint creditors not to sue the debtor does not discharge the debt due to the creditors jointly (*Walmesley* v. *Cooper* (1839), 11 Ad. & El. 216).

(*l*) See *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115, Ex. Ch.; *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q. B. D. 589, C. A.; and cases referred to under title CONFLICT OF LAWS, Vol. VI., pp. 238—242.

(*m*) See title CONFLICT OF LAWS, Vol. VI., pp. 207 *et seq.*, 213 *et seq.*

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# DEEDS OF ASSIGNMENT.

*See* BANKRUPTCY AND INSOLVENCY.

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# DEER.

*See* GAME.

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# DEFAMATION.

*See* LIBEL AND SLANDER.

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# DEFEASANCE.

*See* BONDS; MORTGAGE; TRUSTS AND TRUSTEES.

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# DEL CREDERE AGENT.

*See* AGENCY; SALE OF GOODS.

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# DELEGATION.

*See* AGENCY.

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# DEMISE.

*See* LANDLORD AND TENANT.

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# DEMISE OF THE CROWN.

*See* CONSTITUTIONAL LAW.

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# DEMURRAGE.

*See* SHIPPING AND NAVIGATION.

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# DENTISTS.

*See* MEDICINE AND PHARMACY.

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# DEODAND.

*See* CORONERS.

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# DEPENDENCIES, COLONIES, AND BRITISH POSSESSIONS.


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# Part I.—Definitions and Classification.

## SECT. 1.—*Definitions.*

SECT. 1. Definitions.

**856.** The expression "British possession" means any part of His Majesty's dominions exclusive of the United Kingdom; and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed to be one British possession (*a*). British possession.

A colony is any part of His Majesty's dominions exclusive of the British Islands and of British India; and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed one colony (*b*). Colony.

A British settlement means any British possession which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the legislature of any British possession (*c*). British settlement.

The expression "dependencies" is used to signify places which have not been formally annexed to the British dominions, and are therefore, strictly speaking, foreign territories, but which are practically governed by Great Britain, and by her represented in any relations that may arise towards other foreign countries. Most of them are "protectorates," that is, territories placed under the protection of the British sovereign, generally by treaty with the native rulers or chiefs. Cyprus and Weihaiwei are foreign territories held by Great Britain under special agreements with their respective sovereigns, but administered under the Foreign Jurisdiction Act, 1890 (*d*), on the same general lines as protectorates. India, including both the native States and the strictly British territory of that empire, is frequently spoken of as our great dependency. Dependencies.

**857.** Crown colonies are those in which the Crown retains complete control of the public officers carrying on the government, and the legislative power is either delegated to the officer administering the government (*e*), or is exercised by a Legislative Council which is nominated by the Crown either entirely (*f*) or partly (*g*), the other part being elected. In these colonies, with seven Crown colonies.

(*a*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (2).

(*b*) *Ibid.*, s. 18 (3). For the purposes of the Act to regulate sentences passed by colonial courts in cases over which jurisdiction is given by Imperial Acts, the word "colony" includes India, but not the Isle of Man or the Channel Islands (Courts (Colonial) Jurisdiction Act, 1874 (37 & 38 Vict. c. 27), s. 2).

(*c*) British Settlements Act, 1887 (50 & 51 Vict. c. 54), s. 6.

(*d*) 53 & 54 Vict. c. 37.

(*e*) As in Gibraltar, Ashanti, Virgin Islands (see also under note (*g*), *infra*), St. Helena, and Basutoland.

(*f*) As in Ceylon, the Falklands, Gambia, Gold Coast, Grenada, Hong Kong, St. Lucia, St. Vincent, Seychelles, Sierra Leone, Southern Nigeria, Straits Settlements, including Labuan, Trinidad and Tobago, Turk's Islands, British Honduras.

(*g*) As in British Guiana, Fiji, Malta, Mauritius, Jamaica, the federal Legislative Council of the Leeward Islands. Each of the several presidencies of this last group has a nominated Legislative Council, except the Virgin Islands, the laws of which are made by the Governor of the Leeward Islands.

SECT. 1. Definitions.

exceptions (*h*), the Crown has reserved to itself the power of legislating by Order in Council, which is the original constitutional method of legislating for the colonies.

Protectorates.

**858.** Protectorates, although not parts of His Majesty's Dominions, are administered in much the same manner as Crown colonies. In protectorates, and also in Cyprus and Weihaiwei, the Crown retains complete control of the public officers carrying on the government. By Orders in Council under the Foreign Jurisdiction Act, 1890 (*i*), the legislative power has been delegated either to a High Commissioner administering a group of protectorates (*k*) or to the officer administering the government of the particular protectorate (*l*) or to a Legislative Council in the protectorate (*m*), or to the Legislative Council of an adjoining colony to which the protectorate is attached for the purposes of administration (*n*). In all the protectorates, and also in Cyprus and Weihaiwei, the Crown exercises under the Foreign Jurisdiction Act, 1890 (*o*), a concurrent right of legislation by Order in Council.

Dominions.

**859.** Dominions (*p*) are those colonies which possess elective legislatures to which the executive is responsible as in the United Kingdom, the only officer appointed and controlled by the Crown being the Governor or Governor-General. These colonies are divisible into two categories: first, those in which the legislature consists of two chambers, the upper chamber (or Senate, or Legislative Council) being either elective (*q*) or nominated by the Crown (*r*); and, secondly, those in which there is only one legislative chamber (House of Representatives or Assembly (*s*)).

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The Bahamas, Barbados, and Bermuda have legislatures consisting of two chambers, the upper nominated, the lower elective.

(*h*) Namely, Basutoland, British Honduras, the Bahamas, Barbados, Bermuda, Jamaica and the Leeward Islands.

(*i*) 53 & 54 Vict. c. 37.

(*k*) As in the Bechuanaland protectorate, Swaziland and Basutoland, North-West Rhodesia (South African High Commission), and the groups of islands included in the Western Pacific High Commission.

(*l*) As in North-East Rhodesia, Northern Nigeria, the northern territories of the Gold Coast, Uganda and Somaliland. So also Weihaiwei.

(*m*) As in the East Africa Protectorate, Nyasaland (formerly known as British Central Africa), and South Rhodesia. So also Cyprus.

(*n*) As in the protectorates of the Gambia, Sierra Leone, and Southern Nigeria.

(*o*) 53 & 54 Vict. c. 37, s. 5.

(*p*) New Zealand became the Dominion of New Zealand by Royal proclamation of September 9, 1907, taking effect from September 26, 1907.

(*q*) As in the Australian Commonwealth and the Australian states of Victoria, South Australia, Tasmania, and Western Australia, and the Cape of Good Hope.

(*r*) As in the Dominion of Canada and the Canadian provinces of Quebec and Nova Scotia, in Newfoundland, New South Wales, Queensland, New Zealand, Natal, the Transvaal, and the Orange River Colony. In these last two colonies the legislature may, after four years from the first meeting of the councils (1907), pass laws to make them elective (Transvaal Constitution letters patent December, 1906, Orange River Colony Constitution letters patent June, 1907). The Senate of the Union of South Africa is, for ten years after the establishment of the Union, to be partly nominated and partly elective (South Africa Act, 1909 (9 Edw. 7, c. 9), s. 24).

(*s*) As in the Canadian provinces of Ontario, New Brunswick, Prince Edward

Administration.

**860.** British colonies and protectorates are administered through the Colonial Office, which also exercises control over certain protected States (*t*). India is under a special department known as the India Office. British possessions as above defined include the Isle of Man and the Channel Islands. These, however, are not under the Colonial Office, but matters which arise concerning them are referred to the Home Office; and they are by statute (*u*) included with the United Kingdom under the expression "British Islands."

SECT. 2.—*The Colonial Office: Its Departments and Officials.*

Sovereign in Council.

**861.** Colonial affairs have always, it would seem, so far as they were viewed as matters of state, come under the supervision of the Sovereign; and Orders in Council, by which the policy approved by the Sovereign in his Privy Council was carried out, were originally the instruments of government of all the colonies.

Secretary for Colonies

Since 1854 colonial affairs have been the sole charge of a principal Secretary of State, to whose department at the present time are assigned two under-secretaries, one parliamentary changing with the ministry, four assistant under-secretaries, with a chief clerk, a legal assistant, and a staff of principal, first-class, and second-class clerks (*v*).

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Island, Manitoba, British Columbia, Alberta and Saskatchewan. The North-West Territories are governed by a Commissioner; and the Commissioner in Council is empowered to make ordinances for the Territories. The Yukon territory has a special local administration by a Commissioner under instructions given by order of the Dominion Privy Council or the Minister of the Interior.

(*t*) As to protected States, see p. 521, *post*. The Foreign Office administers such jurisdiction as His Majesty possesses in certain Oriental countries, such as Turkey, Persia and China, where there is a civilised form of government. Zanzibar seems to come under this category; see p. 523, *post*.

(*u*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (1); see also pp. 573 *et seq.*, *post*.

(*v*) At the Restoration in 1660 colonial affairs were formally intrusted to a committee of the Privy Council. In the same year a separate Council of Foreign Plantations was created, which was united in 1672 to the Council for Trade, and was thenceforward known as the Council of Trade and Plantations. Between 1667 and 1695 this council was suppressed, and its functions were exercised by the Privy Council; but it was revived at the latter date, and lasted till 1782, when it was abolished (Civil List and Secret Service Money Act, 1782 (22 Geo. 3, c. 82)), and its functions ordered to be transferred to a committee of the Privy Council, not appointed, however, till 1784 (Order in Council, March 5, 1784, amended by Orders in Council, August 22 and August 25, 1786), under the style of Committee for Trade and Foreign Plantations. During the interval colonial affairs were dealt with by a branch of the Home Department. A Secretary of State for the American or Colonial Department was appointed in 1768; but this department was abolished along with the Council of Trade and Plantations on the separation of the American colonies (the United States of America) in 1782. In 1794 a Secretary of State was appointed for war and the colonies, though the two departments were not really united until 1801. From the former date, however, the Committee for Trade and Foreign Plantations gradually ceased to have any connection with colonial affairs, and became what is now known as the Board of Trade. After the conclusion of the French war the Secretary of State devoted himself chiefly to the colonies, and was usually called Secretary of State for the Colonies; and in 1854 a separate Secretary for War was created; see Colonial Office List, Part I.

SECT. 2. **The Colonial Office: Its Departments and Officials.**

Distribution of duties of Colonial Office.

**862.** The Colonial Office is now (*w*) divided into three departments, the first of which deals with the self-governing colonies, and is known as the Dominions Department, to differentiate the status of the self-governing provinces of the empire from that of the Crown colonies. The staff of this department is in no way concerned with the Crown colonies, except in the case of those Crown colonies and protectorates in the Pacific and connected with South Africa whose interests are closely related to the adjoining self-governing colonies. The department is charged with all questions of emigration, and is in close touch with the Commercial Intelligence Committee of the Board of Trade. The Secretary of the Imperial Conference belongs to it, with direct access to the Secretary of State, though he also has his own special and separate duties. The second department of the Colonial Office is styled the Crown Colonies Department, and is charged with all the administrative and political work of the Crown colonies and protectorates. The third is the General Department, which deals with the legal and general routine business of the office, with all personal questions arising in the Crown colonies, and also with such matters common to all the Crown colonies as currency, banking, postal and telegraph services, education, medical and sanitary questions, pensions, patronage etc. In connection more especially with this department four standing committees for patronage and promotions, railways and finance, concessions and pensions, have been established.

Of the four assistant under-secretaries of State, one takes charge of the Crown Colonies Department; another takes charge of the General Department, presides over the standing committees, and is legal adviser to all the departments; and another takes charge of the Dominions Department, and has a junior assistant under-secretary associated with him, who is also permanent secretary to the Imperial Conference.

Crown agents for colonies.

**863.** The Crown agents for the colonies act as commercial and financial agents in the United Kingdom for all the Crown colonies (*x*). They receive instructions directly from the Colonial Governments, but are supervised by the Secretary of State in matters of importance or on questions of principle. Their salaries are fixed by the Secretary of State, but paid out of funds received from the Governments for which they act, in accordance with a scale of charges fixed by the Secretary of State. Requisitions from the colonies are dealt with under the rules and regulations for His Majesty's colonial service.

The self-governing colonies, except Newfoundland, have established agencies of their own, under the direction of High Commissioners or Agents-General, appointed by the several colonies.

### SECT. 3.—*Constitutions of the Colonies.*

Commonwealth of Australia.

**864.** The Commonwealth of Australia was constituted by an Act of the Imperial Parliament (*y*) which empowered the Sovereign in

(*w*) See despatch of the Earl of Elgin on the reorganisation of the Colonial Office, September, 1907, in Parliamentary Paper Cd. 3,795.

(*x*) See Colonial Office List, Part I.

(*y*) Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12).

Council to declare by proclamation the colonies of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia to be united in a federal commonwealth (*z*), directed that each of the existing colonies and any colonies or territories subsequently admitted should be called a State (*a*), and enacted the form of the constitution (*b*). The Federal Parliament consists of the King (represented by the Governor-General (*c*)), a Senate, and a House of Representatives (*d*). The Senate comprises six members chosen for six years from each State, but the number may be increased or diminished so long as each State is equally represented, and no original State has less than six senators (*e*). The House of Representatives has twice as many members as the Senate, chosen for three years, unless the House is sooner dissolved (*f*). The qualifications of members of the Senate and of members of the House of Representatives are the same. They must be twenty-one years of age, qualified as electors, resident three years, and subjects natural-born or naturalised five years (*g*). The number of members of the House of Representatives may be increased or diminished by the Commonwealth Parliament (*h*). Senators and representatives may resign; and their places are vacated by absence without permission for two consecutive months of any session (*i*), or by becoming subject to certain disabilities, becoming bankrupt or insolvent, or accepting payment for services (*k*). Of either body one-third of the whole number of members constitutes a quorum (*l*). Provision is made for resolving disagreements between the Senate and the House of Representatives (*m*) by a joint dissolution and a joint sitting in each case (*n*).

Federal Parliament.

The executive power is vested in His Majesty, exercisable by the Governor-General as his representative, with the advice of a Federal Council composed of members chosen and summoned by him to hold office during his pleasure (*o*), and including the officers (not exceeding seven) appointed by him to administer the several departments of state according to the exigencies of parliamentary government (*p*). The judicial power is vested in a High Court (*q*),

Executive power.

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(*z*) Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12), s. 3.
(*a*) *Ibid.*, s. 6.
(*b*) *Ibid.*, s. 9.
(*c*) *Ibid.*, art. 2.
(*d*) *Ibid.*, art. 1.
(*e*) *Ibid.*, art. 7.
(*f*) *Ibid.*, arts. 24, 28.
(*g*) *Ibid.*, arts. 16, 34.
(*h*) *Ibid.*, art. 27.
(*i*) *Ibid.*, arts. 19, 20, 37, 38.
(*k*) *Ibid.*, art. 45.
(*l*) *Ibid.*, arts. 22, 39. Each Senator and each representative receives £400 a year (*ibid.*, art. 48).
(*m*) *Ibid.*, art. 57.
(*n*) As to the respective legislative powers of the Commonwealth and the States, see p. 549, *post*.
(*o*) Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12), arts. 61—63.
(*p*) *Ibid.*, arts. 64, 65.
(*q*) *Ibid.*, art. 71. See pp. 554, 583, *post*.

SECT. 3. Constitutions of the Colonies.

with jurisdiction both original and on appeal from the several States (*r*). The collection of revenue and its distribution between the Commonwealth and the States with uniform customs and excise duties and inter-State free trade is provided for; and not more than one-fourth of the net revenue from customs and excise is to be appropriated to meeting the expenses of the Commonwealth (*s*). State rights are preserved over the rivers, for conservation or irrigation (*t*). An inter-State commission has been created to regulate trade and commerce, and to prevent unfair railway preferences or discriminations (*a*). State debts may be taken over by the Commonwealth (*b*).

The constitutions, parliaments, and laws of the several States are protected (*c*), and the admission of new States provided for (*d*). Alterations of the federal constitution require an absolute majority of each House, and must then be submitted to the electors, not less than two, nor more than six months, afterwards; and if in a majority of States a majority of electors voting approve, and also a majority of all the electors voting throughout the Commonwealth, then the law may be presented to the Governor-General for the King's assent (*e*). No alteration in the proportionate representation of any State in either House, or of the minimum number of representatives of any State in the House of Representatives, or of the limits of any State, or of the provisions of the constitution relating thereto, can be made without the approval of a majority of the electors of that State (*f*).

New South Wales.

**865.** Responsible government was conferred upon New South Wales by the Imperial Constitution Act of 1855 (*g*), which empowered the Sovereign to assent to the Constitution Act of the colony passed in 1853 (*h*). Further colonial legislation on the subject has since taken place. There is now a Legislative Council of sixty-one members appointed by the Crown for life, unpaid except the President and the Chairman of Committees and the Ministers. The Legislative Assembly consists of ninety members, elected by ballot on one and the same day for three years, unless the assembly is previously dissolved (*i*). The electorate is composed of all subjects of His Majesty, natural-born or naturalised, of the age of twenty-one years, resident in the State for one year continuously, and in the electoral district for one month. Members of the police force, who are all in the employment of the State, have a vote. In 1902 the franchise was conferred upon women.

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(*r*) Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12), arts. 73, 75, 76.
(*s*) *Ibid.*, arts. 81—99.
(*t*) *Ibid.*, art. 100.
(*a*) *Ibid.*, arts. 101—103.
(*b*) *Ibid.*, art. 105.
(*c*) *Ibid.*, arts. 106—108.
(*d*) *Ibid.*, arts. 121, 124.
(*e*) *Ibid.*, art. 128.
(*f*) *Ibid.*
(*g*) New South Wales Constitution Act, 1855 (18 & 19 Vict. c. 54).
(*h*) 17 Vict., No. 41; Schedule to 18 & 19 Vict. c. 54.
(*i*) Each member receives £300 a year.

SECT. 3. Constitutions of the Colonies.

Queensland.

**866.** The constitution of Queensland was established by Act of the colony passed in 1867 (*j*) under powers granted by an Order in Council (*k*) validated by an Act of the Imperial Parliament (*l*). The Legislative Council consists of forty-four members, nominated by the Governor for life. The Legislative Assembly consists of seventy-two members, elected by ballot. A recent Colonial Act (*m*) provides for male and female adult franchise, on a twelve months' residential qualification. Plural voting is allowed. No property qualification is required for members in either House.

Victoria.

**867.** Responsible government was established in Victoria by an Act of the colony passed in 1854, and assented to by the Sovereign in Council, in pursuance of an Act of the Imperial Parliament (*n*). By this and subsequent colonial legislation there is a Legislative Council of thirty-four members, one of whom represents the public service and the railways, elected for six years, half retiring every three years, exempt from dissolution except on account of disagreement with the Assembly. There is a property qualification both for members and electors. The Legislative Assembly consists of sixty-five members, representing as many districts, and two members representing the railways, and one the public service. The members are elected virtually by manhood suffrage, for three years unless the Assembly is previously dissolved (*o*). There is no property qualification for members, and no plural voting is allowed.

South Australia.

**868.** The constitution of South Australia was established by Act of the colony passed in 1856 (*p*), under the authority of an Imperial Act (*q*). Subsequent colonial legislation has taken place on the subject. The Legislative Council now consists of eighteen members, elected by ballot for six years, half retiring every three years. If the Council twice reject a Bill twice passed by the House of Assembly, a general election having intervened, it may be dissolved, or additional members may be called up; but in the latter case no vacancies may be filled up while the number of members is eighteen or more. A member of the Council must be thirty years of age, a subject of His Majesty, and a resident in the State for three years. An elector must be twenty-one years old, also a subject of His Majesty, and have been six months on the electoral roll, with a property qualification. The House of Assembly consists of forty-two members, elected for three years, subject to an earlier dissolution. Members must be qualified electors. Electors must be of full age, subjects of His Majesty, and must have been six

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(*j*) Constitution Act of 1867 (31 Vict. No. 38).
(*k*) Dated June 6, 1859.
(*l*) Australian Colonies Act, 1861 (24 & 25 Vict. c. 44), s. 3. See also Colonial Office List, p. 35.
(*m*) Elections Acts Amendment Act, 1905 (5 Edw. 7, No. 1).
(*n*) Victoria Constitution Act, 1855 (18 & 19 Vict. c. 55).
(*o*) Each member is paid £300 a year unless he is in receipt of an official salary.
(*p*) Constitution Act (No. 2 of 1855–1856).
(*q*) Australian Constitutions Act, 1850 (13 & 14 Vict. c. 59).

SECT. 3. Constitutions of the Colonies.

months on the roll. Women may vote in the election of both Houses (*r*).

Western Australia.

**869.** The constitution of Western Australia was established in the colony in 1890 by an Act of the colony scheduled to an Act of the Imperial Parliament (*s*), by which latter Act the Sovereign was empowered to assent, by Order in Council, to the colonial Act. There has been subsequent colonial legislation on the subject. There is now a Legislative Council of thirty members, elected for six years. Members must be thirty years old, resident in the State for two years, natural-born subjects of His Majesty or naturalised and resident for five years. Electors may be of either sex, must be twenty-one years old, subjects of His Majesty, resident in the State for six months, and must have property of a certain value in the electoral district. The Legislative Assembly consists of fifty members, elected for three years. Members must have resided in the State for twelve months, be twenty-one years old, His Majesty's subjects, natural-born or naturalised for five years and resident two. Electors may be of either sex, must be subjects of His Majesty, resident for six months in the State, and either resident, or possessing property, in the district for which they vote.

Tasmania.

**870.** The constitution of Tasmania was established by an Act of the colony (*t*), which was passed in 1854, and received the Royal Assent in 1855, under the authority of an Imperial Act (*u*), and amended since by further legislation of the colony. There is now a Legislative Council of eighteen members, elected for six years, unless reduced to less than nine in number. Members must be thirty years of age and natural-born or naturalised subjects of His Majesty, with a property qualification. The House of Assembly consists of thirty-five members, natural-born or naturalised subjects of His Majesty, elected by ballot for three years (*v*). Electors must be twenty-one years of age, British subjects, and resident for twelve months. Women have a vote. Members of the Commonwealth Parliament cannot sit in either House, nor can members of a Commonwealth Ministry be Ministers of the colony.

Territory of Papua.

**871.** British New Guinea, formerly administered as a Crown colony, has become a dependency of the Commonwealth of Australia, under the name and style of the Territory of Papua (*w*).

New Zealand.

**872.** Responsible government was conferred upon New Zealand in 1852 by an Act of the Imperial Parliament (*x*) establishing a General Assembly consisting of the Governor, a nominated

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(*r*) Members of both Houses are paid £200 a year.

(*s*) Western Australia Constitution Act, 1890 (53 & 54 Vict. c. 26); Constitution Act, 1889 (52 Vict., No. 23).

(*t*) Constitution Act (18 Vict., No. 17).

(*u*) Australian Constitutions Act, 1850 (13 & 14 Vict. c. 59).

(*v*) Members except Ministers and certain officers of Parliament are paid £100 per annum.

(*w*) By Proclamation of the Governor-General, dated September 1, 1906, under the provisions of the Papua Act, 1905, of the Commonwealth.

(*x*) New Zealand Constitution Act, 1852 (15 & 16 Vict. c. 72).

Legislative Council, and an elective House of Representatives. Members of the Council are appointed for seven years. The House of Representatives consists of eighty members, including four Maories elected by the natives (*y*). Women of both the European and native races may vote. European electors must be of age, resident one year in the State and three months in an electoral district. Every adult Maori, resident in a Maori electoral district, may vote without being registered.

Cape Colony.

**873.** Responsible government was established in Cape Colony by an Act of the colony passed in 1872 (*z*), and assented to by the Sovereign by Order in Council dated August 9 of the same year. By that and subsequent legislation there were established a Legislative Council of twenty-six members, with a property qualification, elected by ballot for seven years, presided over *ex officio* by the Chief Justice, and a House of Assembly of one hundred and seven members, elected by ballot for five years, paid office-holders other than Ministers being ineligible. The franchise is the same for both Houses with a small property qualification. Colour is no bar, but every voter on registration must be able to write his name, address, and occupation (*a*). By statute speeches may be made either in English or Dutch.

Natal.

**874.** The colony of Natal received responsible government by an Act of the colony passed in 1893 (*b*), and assented to by the Sovereign the same year. A Legislative Council was thereby created, consisting of thirteen members, with a property qualification, summoned by the Governor, for ten years, five or eight vacating their seats every five years alternately. There is also a Legislative Assembly of forty-three members, qualified as electors, elected for four years, subject to the earlier dissolution (*c*). Electors must have a property qualification.

Transvaal.

**875.** The Transvaal received responsible government by Letters Patent, dated December 6, 1906. The Legislature consists of a Legislative Council of fifteen summoned by the Governor (*d*); members must be thirty years of age or upwards, and resident for three years in the Colony (*e*), six being a quorum; and a Legislative Assembly of sixty-nine (*f*) elected for five years, unless sooner dissolved (*g*), by white male British subjects of twenty-one years of age, exclusive of persons on full pay in His Majesty's regular forces (*h*), twenty-one being the quorum (*i*). Voters must be resident for six months next before the

(*y*) Members of the Council are paid monthly at the rate of £200 per annum, and members of the House of Representatives are paid £25 per month.
(*z*) Constitution Ordinance Amendment Act, 1872 (No. 1 of 1872).
(*a*) Members of both Houses receive one guinea a day, besides 15*s.* a day for not more than ninety days if they reside more than fifteen miles from Cape Town.
(*b*) Constitution Act of 1893 (Law No. 14, 1893).
(*c*) Members of the Assembly who reside more than two miles from the seat of government receive a travelling allowance of £1 per diem.
(*d*) Letters Patent, Dec. 6, 1906, art. 2.
(*e*) *Ibid.*, art. 3.
(*f*) *Ibid.*, arts. 6, 8.
(*g*) *Ibid.*, art. 26.
(*h*) *Ibid.*, art. 9.
(*i*) *Ibid.*, art. 21.

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commencement of the framing of a general register, and must not have been convicted of certain crimes, nor in receipt of public relief within the above-mentioned period. Any person qualified as voter may be elected as member either of the Council or the Assembly (*k*), but a member of the latter must not hold any office of profit under the Crown other than as a Minister, nor be a rehabilitated insolvent or in liquidation, nor be declared of unsound mind. After the expiration of four years from the date of their first meeting the legislature may make the Council elective. The legislature must hold a session at Pretoria once a year (*l*). Either the English or the Dutch language may be used for debates, papers, or proposed laws; but the journals, minutes and proceedings of both Houses must be in English (*m*). Acts are published in the *Gazette* in both English and Dutch (*n*), but are enrolled on record in the office of the Registrar of the High Court in English (*o*). Disagreements between the two Houses are resolved by joint sittings convened by the Governor (*p*).

Orange Free State.

**876.** The Orange River Colony, now called the Orange Free State (*q*), received responsible government by Letters Patent dated June 5, 1907. The legislature consists of a Legislative Council of eleven summoned by the Governor (*r*), who must be thirty years of age and resident for three years in the Colony (*s*), four being a quorum (*t*); and a Legislative Assembly of thirty-eight (*u*) elected for five years, unless sooner dissolved, by the white male British subjects of twenty-one years of age, exclusive of persons on full pay in His Majesty's regular forces (*a*), ten being the quorum (*b*). Voters must have been resident six months before the commencement of framing the general register (*c*), not convicted of certain crimes, nor in receipt of public relief within the above period. Any person qualified as voter may be elected member of either House (*d*). The legislature must hold a session once a year (*e*) at Bloemfontein (*f*). Either English or Dutch may be used in debates, papers, or proposed laws; but the journals, minutes and proceedings of both Houses must be in English (*g*). Acts are

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(*k*) Letters Patent, Dec. 6, 1906, arts. 3, 18.
(*l*) *Ibid.*, arts. 24, 25.
(*m*) *Ibid.*, art. 34.
(*n*) *Ibid.*, art. 44.
(*o*) *Ibid.*, art. 45.
(*p*) *Ibid.*, art. 37. Members of both Houses (except Ministers and the President of the Council and the Speaker of the Assembly) receive £150 a year and £2 a day during attendance, not exceeding altogether £300 a year (art. 35).
(*q*) As to change of name see p. 517, *post*.
(*r*) Letters Patent, June 5, 1907, art. 2.
(*s*) *Ibid.*, art. 3.
(*t*) *Ibid.*, art. 6.
(*u*) *Ibid.*, art. 8.
(*a*) *Ibid.*, art. 28.
(*b*) *Ibid.*, art. 28.
(*c*) *Ibid.*, art. 10.
(*d*) *Ibid.*, arts. 3, 20.
(*e*) *Ibid.*, art. 26.
(*f*) *Ibid.*, art. 27.
(*g*) *Ibid.*, art. 36.

published in the *Gazette* in both English and Dutch (*h*), but are enrolled on record in the office of the Registrar of the High Court in English (*i*). Disagreements between the two Houses are resolved by joint sittings convened by the Governor (*k*).

Union of South Africa.

**877.** The Union of South Africa was constituted by an Act of the Imperial Parliament (*l*), which empowered the King in Council to declare by proclamation the colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony to be united in a Legislative Union (*m*), and directed that each of the colonies should become original provinces of the Union, the name of the Orange River Colony being changed to Orange Free State (*n*). The King in Council may, on addresses from the Union Parliament, admit into the Union the territories administered by the British South Africa Company (*o*), and transfer to the Union the government of any other territories belonging to or under the protection of His Majesty and inhabited wholly or in part by natives (*p*). The Executive Government is vested in the King to be administered by His Majesty in person, or by a Governor-General as his representative (*q*), with the advice of an Executive Council composed of members chosen and summoned by him to hold office during his pleasure (*r*), and including the officers (not exceeding ten in number) appointed by him to administer the departments of State as the King's Ministers of State for the Union. No Minister of State may hold office longer than three months, unless he is or becomes a member of either House of Parliament (*s*). All executive powers existing in the colonies at the establishment of the Union are, as far as they continue in existence or can be exercised, vested in the Governor-General or Governor-General in Council or other appropriate analogous authorities, unless the South Africa Act or the Parliament otherwise provide (*t*). Pretoria is the seat of Government (*a*), but Cape Town is the seat of the legislature (*b*) of the Union, and Bloemfontein the ordinary place for the sittings of the Appellate Division of the Supreme Court of South Africa (*c*).

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(*h*) Letters Patent, June 5, 1907, art. 46.
(*i*) *Ibid.*, art. 47.
(*k*) *Ibid.*, art. 39. Members of the legislature, excepting Ministers and the President of the Council and the Speaker of the Assembly, receive £150 per annum, besides £2 per diem during attendance at a session, not exceeding altogether £300 per annum (art. 37).
(*l*) South Africa Act, 1909 (9 Edw. 7, c. 9).
(*m*) *Ibid.*, s. 4.
(*n*) *Ibid.*, s. 6.
(*o*) *Ibid.*, s. 150.
(*p*) *Ibid.*, s. 151. A schedule is attached to the Act embodying the terms and conditions upon which the Governor-General may undertake the government of such transferred territory.
(*q*) *Ibid.*, s. 8. The Governor-General has a salary of £10,000 a year (s. 10). He may appoint a deputy to act during his temporary absence (s. 11).
(*r*) *Ibid.*, s. 12.
(*s*) *Ibid.*, s. 14.
(*t*) *Ibid.*, s. 16.
(*a*) *Ibid.*, s. 18.
(*b*) *Ibid.*, s. 23.
(*c*) *Ibid.*, s. 109.

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The Parliament of the Union consists of the King, a Senate, and a House of Assembly (*d*), summoned by the Governor-General to meet at least once a year (*e*). The Governor-General may dissolve both Senate and Assembly simultaneously, or the Assembly alone, but not the Senate within ten years after the establishment of the Union (*f*). For ten years after the establishment of the Union the Senate will, in respect of the original provinces, be constituted of eight senators nominated by the Governor-General in Council for ten years, one half being selected mainly on the ground of their thorough acquaintance with the reasonable wants of the coloured races in South Africa, and of eight senators elected, before the proclamation of the Union, for ten years for each original province, by the two Houses of such colony specially summoned by the Governor sitting together as one body, and presided over by the Speaker of the Legislative Assembly. If the seat of a nominated senator becomes vacant, the Governor-General in Council must nominate another senator to hold his seat for ten years. If the seat of an elected senator becomes vacant, the provincial council of the province for which such senator has been elected must elect another senator for the unexpired portion of the ten years (*g*). After the expiration of ten years Parliament may provide for the constitution of the Senate. Until it has done so the provisions set out above as to nominated senators continue in operation; eight senators will be elected for ten years, unless the Senate be sooner dissolved by the provincial council and the members of the House of Assembly elected for each province; if an elected senator's seat becomes vacant, a successor must be elected in the same way for the unexpired part of the ten years (*h*).

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A senator must (1) be not less than thirty years of age; (2) be qualified to be registered as a voter for the election of members of the House of Assembly in one of the provinces; (3) have resided for five years within the limits of the Union as existing when he is elected or nominated; (4) be a British subject of European descent; (5) if an elected senator, he must be the registered owner of immovable property within the Union of not less than £500 value above mortgages thereon; residence and property within a colony before incorporation in the Union are to be treated as residence and property within the Union (*i*). Twelve senators constitute a quorum (*k*). The House of Assembly will continue for five years from its first meeting unless sooner dissolved by the Governor-General (*l*). The original number of members of the House of Assembly is fifty-one for the Cape of Good Hope, seventeen for Natal, thirty-six for the Transvaal, and seventeen for the Orange Free State (*m*). The numbers may be automatically increased in

(*d*) South Africa Act, 1909 (9 Edw. 7, c. 9), s. 19.
(*e*) *Ibid.*, ss. 20, 22.
(*f*) *Ibid.*, s. 20.
(*g*) *Ibid.*, s. 24.
(*h*) *Ibid.*, s. 25.
(*i*) *Ibid.*, s. 26.
(*k*) *Ibid.*, s. 30.
(*l*) *Ibid.*, s. 45.
(*m*) *Ibid.*, s. 33.

identical proportions to the male adult European population in each province according to a census taken in 1911, and every five years thereafter, until the number of members of the House for the original provinces reaches the total of one hundred and fifty, and not further unless Parliament otherwise provides (*n*); but they may not be diminished before that or until after ten years from the establishment of the Union (*o*). The qualifications of voters for the House of Assembly must be prescribed by Parliament by law; but no person registrable as a voter in the Cape of Good Hope at the establishment of the Union is to be disqualified in that province by reason of his race or colour only, unless by bill passed by both Houses of Parliament sitting together and agreed to on the third reading by not less than two-thirds of the total number of members of both Houses. And no person on the register in any province at the passing of such law shall be removed therefrom by reason only of disqualification based on race or colour (*p*). Meanwhile the existing qualifications of parliamentary voters in the several colonies will enure for the elections to the House of Assembly in the corresponding provinces. But no member of His Majesty's regular forces on full pay may be registered as a voter (*q*). The existing laws as to elections to the Houses of Parliament in the colonies will apply *mutatis mutandis* to elections in the provinces to the House of Assembly. At any general election to the House all polls must be taken on the same day throughout the Union (*r*). Provision is made for the appointment, before the establishment of the Union, of a commission of judges from the several colonies to delimit electoral divisions in the various provinces (*s*), each to return one member (*t*); and after every quinquennial census the Governor-General in Council is to appoint a commission of three judges of the Supreme Court of South Africa, acting with the same power and on the same principles, to redivide if necessary the electoral divisions, and allocate accordingly the number of members in each province (*a*), any alteration in those respects to come into operation at the next following general election (*b*). The qualifications of a member of the House of Assembly are the same as those of a senator, exclusive of any age limit or property qualification (*c*). Both senators and members of the House of Assembly may resign their seats (*d*). They vacate their seats on conviction for any crime or offence entailing imprisonment without the option of a fine for not less than twelve months, unless followed by an amnesty or free pardon, or after the lapse of five years; on unrehabilitated

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(*n*) South Africa Act, 1909 (9 Edw. 7, c. 9), s. 34.
(*o*) *Ibid.*, s. 33.
(*p*) *Ibid.*, s. 35,
(*q*) *Ibid.*, s. 36.
(*r*) *Ibid.*, s. 37.
(*s*) *Ibid.*, ss. 38, 39, 40, 42.
(*t*) *Ibid.*, s. 39.
(*a*) *Ibid.*, s. 41.
(*b*) *Ibid.*, s, 43.
(*c*) *Ibid.*, s. 44.
(*d*) *Ibid.*, ss. 29, 48.

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insolvency; on declaration of insanity; on accession to any office of profit under the Crown within the Union, except a Minister of State for the Union, a pensioner of the Crown, a member of His Majesty's naval or military forces on retired or half-pay, or of the naval or military forces of the Union not wholly employed by the Union; on becoming disqualified, or on failing for a whole ordinary session to attend without special leave from the House they are members of (*e*). A penalty of £100 a day is attached to sitting as member of either House while knowingly disqualified (*f*). Thirty members constitute a quorum of the House of Assembly (*g*). No member of either House of Parliament can be chosen or can sit as a member of the other House; but every Minister of State who is a member of either House may sit and speak in both, but only vote in that of which he is a member (*h*).

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Each province has an administrator, appointed for five years as far as practicable from among residents in the province, and a deputy administrator (*i*), and a council, elected and undissolvable for three years, of the same number of members as the province sends to the House of Assembly, but never less than twenty-five, qualified, as also their electors, in the same way as electors of members of the House of Assembly (*k*). Any member of a provincial council elected to either House of Parliament thereupon vacates his seat on the council (*l*). Four persons are to be elected by each provincial council, at its first general meeting after a general election, to form, with the administrator as chairman, an executive committee for the province, with all powers, authorities, and functions at the establishment of the Union vested in or exercisable by the Governor or Governor in Council or any minister of any colony. The administrator and any other member of the committee, not a member of the council, may take part in the council's proceedings, but has not a vote (*m*).

Provision is made for the constitution of a consolidated revenue fund, and a railway and harbour fund (*n*); payment of the annual interest on the public debts of the colonies (*o*); the transfer of colonial property to the Union; the vesting in the Governor-General of Crown lands, public works etc., mines and minerals, ports, harbours, and railways (*p*); the assumption by the Union

(*e*) South Africa Act, 1909 (9 Edw. 7, c. 9), ss. 53, 54.
(*f*) *Ibid.*, s. 55.
(*g*) *Ibid.*, s. 49.
(*h*) *Ibid.*, s. 52. Each senator and member of the House of Assembly (except salaried Ministers and the President of the Senate and the Speaker of the Assembly) receives £400 a year from the date he takes his seat, subject to deduction for absence during the session or committee of £3 a day (s. 56).
(*i*) *Ibid.*, s. 68.
(*k*) *Ibid.*, ss. 70, 71, 73. They receive allowances determined by the Governor-General (s. 76).
(*l*) *Ibid.*, s. 72.
(*m*) *Ibid.*, ss. 78—81. They receive such remuneration as the provincial council, with the approval of the Governor-General, determines.
(*n*) *Ibid.*, s. 117.
(*o*) *Ibid.*, s. 119.
(*p*) *Ibid.*, ss. 121—123, 125.

of the debts of the colonies (*q*); the constitution of a harbour and railway board; the administration of railways, ports and harbours, and uniformity in railway rates (*r*); the appointment of a Controller and Auditor-General (*s*); the compensation of colonial capitals for diminution of prosperity by reason of their ceasing to be seats of government (*t*); for the continuation of existing colonial laws (*u*); for free trade throughout the Union (*a*); for securing the equality of the English and Dutch languages (*b*); effectiveness throughout the Union of naturalisation in any of the colonies (*c*); preservation of rights of officers of the public services of the colonies (*d*); the control and administration of native affairs and of matters specially or differentially affecting Asiatics by the Governor-General in Council (*e*); and the devolution on the Union of all rights and obligations under conventions or agreements binding on any of the colonies (*f*).

Dominion of Canada.

**878.** The constitution of Canada was conferred upon it by the British North America Act, 1867 (*g*), since modified by subsequent Imperial (*h*) and colonial legislation. There is one Parliament for the Dominion, comprising a Senate of eighty-seven members, with a property qualification, nominated for life by the Governor-General, twenty-four of whom sit for Ontario, twenty-four for Quebec, and the remainder for the other provinces; and a House of Commons of two hundred and fourteen members, elected by ballot for five years unless Parliament is sooner dissolved, without property qualification, on the basis of the population at each decennial census, so that Quebec shall always have sixty-five members, and the other provinces in proportion. The franchise is regulated by the provincial legislatures (*i*).

Canadian provinces.

The government of each province is administered by a Lieutenant-Governor, appointed by the Governor-General, for five years at least. Each province has a Legislative Assembly. That in Quebec consists of seventy-four members, elected for four years by manhood suffrage; that in Ontario consists of ninety-eight paid members, also elected for four years by manhood suffrage; that in Nova Scotia of thirty-eight members, elected for five years (*k*);

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(*q*) South Africa Act, 1909 (9 Edw. 7, c. 9), s. 124.
(*r*) *Ibid.*, ss. 126—131.
(*s*) *Ibid.*, s. 132.
(*t*) *Ibid.*,s. 133.
(*u*) *Ibid.*, s. 135,
(*a*) *Ibid.*, s. 136.
(*b*) *Ibid.*, s. 137.
(*c*) *Ibid.*, s. 138.
(*d*) *Ibid.*, ss. 140—146.
(*e*) *Ibid.*, s. 147.
(*f*) *Ibid.*, s. 148.
(*g*) 30 & 31 Vict. c. 3.
(*h*) British North America Act, 1871 (34 Vict. c. 28); Parliament of Canada Act, 1875 (38 & 39 Vict. c. 38); British North America Act, 1886 (49 & 50 Vict. c. 35).
(*i*) The members of both Houses receive $2,500 per annum each subject to a deduction for non-attendance in the case of members of the House of Commons.
(*k*) Paid $500 a session

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that in New Brunswick of forty-six elected members (*l*); that in British Columbia of forty-two members, elected for four years by manhood suffrage, qualified by residence for six months (*a*); that in Prince Edward Island of thirty elected members (*b*); that in Manitoba of forty-one members, elected for four years by manhood suffrage (*c*); that in Alberta of twenty-five and that in Saskatchewan of forty-one members. Quebec and Nova Scotia have also each a Legislative Council, that in Quebec consisting of twenty-four members, that in Nova Scotia of twenty-one members, each of whom is nominated for life by the Lieutenant-Governor in Council.

Newfoundland.

**879.** In Newfoundland responsible government has existed since 1855. There is a Legislative Council of eighteen members, including the President, nominated by the Crown and holding office during pleasure. The Governor has power to fill up vacancies provisionally, but not beyond fifteen in number, and appoints the President from among the members. Five constitute a quorum. The House of Assembly now (*d*) consists of thirty-six members, elected by ballot by eighteen districts for four years from date of meeting, some single-membered, the quorum being twelve. Members must be male British subjects resident in the colony for two years with an income of $480, or property worth $2,400. Electors must be male British subjects, twenty-one years of age, who have been resident two years in the colony (*e*).

Some general remarks.

**880.** Some Constitution Acts (*f*) provide that a councillor's seat shall be vacated by absence for two successive sessions without permission. Where a member had obtained leave of absence for a year, which covered the whole of one session and a part of another, and he remained absent for the session wholly covered by his leave, for the session partly so covered, and for the next subsequent session, it was held that this provision came into effect, and that the member's seat was vacated (*g*). Contractors for the public service are in some Constitution Acts (*h*) disqualified from sitting or voting in the Council or Assembly, except where the contract is made by any company consisting of more than twenty persons; and a penalty is imposed for disobedience. The penalty, however, could not be exacted where a member of the Assembly was one of the owners of a ship, chartered to the Government by his general agents, contrary to his express direction, by an agreement which set up no privity of contract between the owners of the ship and the Government, no

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(*l*) Paid $500 a session and travelling expenses.
(*a*) Paid $1,200 a session and travelling expenses.
(*b*) Paid $160 per annum, $12 for postage and travelling expenses.
(*c*) Paid $1,000 a session and travelling expenses.
(*d*) See Newfoundland Act, 1842 (5 & 6 Vict. c. 120), ss. 1—4.
(*e*) Members of both Houses are paid. The President of the Council receives $240 and the other members $120 each session. Members of the Assembly receive $200 if resident in St. John's, and $300 if resident elsewhere, each session.
(*f*) *E.g.*, New South Wales and Queensland.
(*g*) *A.-G. of Queensland* v. *Gibbon* (1887), 12 App. Cas. 442, P. C.
(*h*) *E.g.*, New South Wales, Queensland, and Western Australia.

knowledge of the Government being shown that the agents had general authority to bind the member (*i*).

Mode of grant of constitutions to self-governing colonies.

**881.** It will be noticed that while the constitutions of some of the self-governing colonies (or dominions) are embodied in Acts of the Imperial Parliament, notably those of the great federal communities of Canada and Australia and that of the Union of South Africa, most of them, in their present form at least, have been enacted by colonial Acts authorised or sanctioned by Imperial Acts or by Orders of the Sovereign in Council in pursuance of Imperial Acts (*k*). It may be noted that six of the legislatures which have been referred to are elected upon a franchise granted to women equally with men (*l*); that in ten (*m*) the members of the lower House only are paid, and that in six (*n*) the members of both Houses are paid.

Election expenses.

**882.** In the Dominion and Provinces of Canada the cost of parliamentary elections (*o*) is borne by the respective Governments, so far as the expenses of returning officers are concerned; but the personal expenses of candidates and the cost of agents and of canvassing are not included. Each candidate has to deposit with the returning officer a sum varying from $200 in the Dominion, Quebec, British Columbia, and Manitoba to $100 in Nova Scotia and Saskatchewan, which is returned if the candidate is elected or receives half the number of votes polled by the successful candidate. In Prince Edward Island each candidate pays $1.50 if there is no contest, and $10 if there is a contest, which sums are not returned.

In Cape Colony candidates have to secure or pay £50 as security for their proportionate share of the polling expenses of elections to the Assembly. The expenses of elections to the Legislative Council are chargeable against the general revenue of the colony. In Natal the cost of all parliamentary elections is borne by the colony.

In the Commonwealth of Australia the entire cost of elections to the Senate and House of Representatives is borne by the Commonwealth. In Victoria the expenses of parliamentary elections is paid out of the consolidated revenue, a candidate for the Legislative Council depositing £100, and a candidate for the Legislative Assembly depositing £50, which sums are repaid to candidates who are successful, or receive at least one-fifth of the votes of the respective successful candidates. In New South Wales the expense of printing and issuing the electoral rolls, providing polling

(*i*) *Miles* v. *McIlwraith* (1883), 8 App. Cas. 120, P. C.; and compare *Norton* v. *Taylor*, [1906] A. C. 378, P. C.

(*k*) In the case of Cape Colony, the Order in Council by which Her late Majesty assented to the Constitution Act was not issued in pursuance of an Act of Parliament.

(*l*) New South Wales, South Australia, Western Australia, Tasmania, Queensland and New Zealand.

(*m*) New South Wales, Victoria, Tasmania, Ontario, Nova Scotia, New Brunswick, British Columbia, Prince Edward Island, Manitoba, Natal (if living more than two miles from the seat of government).

(*n*) The Commonwealth of Australia, South Australia, New Zealand, the Dominion of Canada, Newfoundland, Cape of Good Hope.

(*o*) See Blue Book (Cd. 3919) presented to both Houses, March, 1908.

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booths, and paying polling officers is borne by the State, the candidates bearing their own, their agents', and canvassing expenses. No vehicles for the conveyance of voters to the poll are allowed. In South Australia the cost of elections to both the Legislative Council and the House of Assembly is paid by the State, exclusive of the candidates' expenses, which are defrayed by themselves. In Queensland the cost of elections to the Legislative Assembly is borne by the State, candidates paying to the returning officers £20 each, which is repaid to candidates who are successful or receive not less than one-fifth of a successful candidate's votes. In Tasmania the total election expenditure in connection with parliamentary elections is borne by the State. Each candidate deposits with the returning officer £25, which is forfeited if he obtains less than one quarter of a successful candidate's votes. No payments are allowed to persons employed before or during elections for promoting a candidate's election; and a candidate's total expenditure in connection with an election is limited to £50, of which he must transmit a return to the returning officer within thirty days of the poll.

In New Zealand the cost of conducting elections is paid by the colony. Each candidate deposits with the returning officer £10, which is repaid if he obtains not less than one quarter of the votes of a successful candidate.

### SECT. 4.—*The Colonies and the Navy.*

Provision by colonies of vessels of war.

**883.** The legislative authority of any colony may, with the approval of His Majesty in Council, from time to time provide vessels of war, and raise men and commission officers for service thereon, and obtain from the Admiralty officers and men of the Royal Navy for the same purpose. And His Majesty in Council may authorise the Admiralty to accept from any colony vessels of war with their crews for the Royal Navy as well as naval volunteers (*p*). The same authority may also provide that naval volunteers raised and maintained in the colony shall form part of the Royal Naval Volunteer Reserve constituted under the Naval Forces Act, 1903 (*q*); and that any seamen and others raised and maintained for service on board vessels provided by the colonial Government shall also be bound to service in the Royal Navy on emergency (*r*).

Contributions by certain colonies.

**884.** Under the naval agreement of 1903 between the Admiralty of the United Kingdom and the Governments of the Commonwealth of Australia and New Zealand (*s*), a naval force is to be maintained

(*p*) Colonial Naval Defence Act, 1865 (28 & 29 Vict. c. 14), ss. 3, 6, 7. Victoria has provided the *Victoria*, *Albert*, and *Childers* and 200 officers and men (Orders in Council, March 4th, 1884, and August 7th, 1900); South Australia, the *Protector*, with its crew (Orders in Council, December 30th, 1884, August 7th, 1900); Queensland, the *Gayundah* (Order in Council, June 24th, 1885); and New South Wales, 300 officers and men (Order in Council, August 7th, 1900).

(*q*) 3 Edw. 7, c. 6.

(*r*) Colonial Naval Defence Act, 1909 (9 Edw. 7, c. 19), ss. 1, 2; s. 1 has retrospective effect.

(*s*) Ratified and approved, so far as it affects the Commonwealth, by the Naval

on the Australian station, consisting of one armoured cruiser of the first class, two cruisers of the second class, four cruisers of the third class, and four sloops, manned by twenty-five officers and seven hundred seamen and stokers of the Royal Naval Reserve (*t*). Provision is made for a base (*u*). Eight nominations for naval cadetships are to be appropriated annually to the Commonwealth, and two to New Zealand (*v*). The Commonwealth and New Zealand are to pay respectively a sum not exceeding £200,000 and £40,000 per annum in advance (*w*), and the respective legislatures are to pass special appropriations annually for ten years, with two years' notice to discontinue, and so on subsequently from each special appropriation (*a*). Natal pays to the Admiralty an annual sum of £35,000 towards the support of the navy (*b*). The Cape Colony pays £50,000 per annum towards the annual expenditure of the Imperial Government in connection with His Majesty's naval service (*c*). Newfoundland pays an annual amount of £3,000 towards the expenses of the navy.

## SECT. 5.—*Protectorates.*

Nature and administration of protectorates.

**885.** There is no statutory or authoritative definition of the term "protectorate," although it appears in two recent statutes (*d*). Protectorates are not British territory in the strict sense; but it is understood that no other civilised Power will interfere in their affairs (*e*). They are administered under the provisions of Orders in Council issued by virtue of powers conferred upon His Majesty by the Foreign Jurisdiction Act, 1890 (*f*), "or otherwise vested in His Majesty," which latter phrase may be taken to be intended to bring in aid any exercise of the royal prerogative that may be necessary to supplement His Majesty's statutory powers. Some protectorates consist of territories adjacent to colonies, for which, not being under the control of any responsible government, it has become necessary to provide some kind of administration for the purposes of law and order. Such are the Protectorates of Sierra Leone (*g*) and the Gambia (*h*), which are administered by the Governments of the colonies of the same name respectively. Ashanti and the Northern Territories of the Gold Coast are each placed under a chief

Sierra Leone and the Gambia.

Ashanti and Gold Coast Territories.

Agreement Act, 1903 (3 Edw. 7, No. 8), and so far as it affects New Zealand by the Australian and New Zealand Naval Defence Act, 1903 (3 Edw. 7, No. 50).

(*t*) Australian and New Zealand Naval Defence Act, 1903 (3 Edw. 7, No. 50), Schedule, art. 1.

(*u*) *Ibid.*, art. 2.

(*v*) *Ibid.*, art. 6.

(*w*) *Ibid.*, art. 8.

(*a*) *Ibid.*, art. 10.

(*b*) See the Navy Contribution Act, 1903 (Natal Acts, No. 5 of 1903).

(*c*) Navy Contribution Act, 1898 (No. 20 of 1898), and Navy Contribution Increase Act, 1902 (No. 14 of 1902).

(*d*) Evidence (Colonial Statutes) Act, 1907 (7 Edw. 7, c. 16), s. 1 (5); Reserve Forces Act, 1906 (6 Edw. 7, c. 11), s. 1 (1).

(*e*) See and compare the Berlin Convention, July 1878, as to "spheres of influence," out of which protectorates seem to have been evolved.

(*f*) 53 & 54 Vict. c. 37.

(*g*) Order in Council, August 24, 1895.

(*h*) Order in Council, November 23, 1893.

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commissioner, in subordination to the Governor of the Gold Coast, with commissioners of provinces (in Ashanti) and districts (in the Northern Territories) under him (*i*).

East Africa.

**886.** The East Africa Protectorate is virtually a Crown colony, but its government is provided for by successive Orders in Council (*j*), placing it under a Governor and Commander-in-Chief, with executive and legislative councils and power to legislate by ordinance. There is a High Court at Mombasa, and sessions at Nairobi, Naivasha, and Kisumu. Where natives are litigants local ideas and customs are taken into consideration.

North-Eastern Rhodesia and Nyasaland.

**887.** The Protectorate of North-Eastern Rhodesia is administered under Orders in Council (*k*), by the last of which the Governor and Commander-in-Chief of the Nyasaland Protectorate is made the supreme authority. This latter protectorate has absorbed British Central Africa, and possesses executive and nominated legislative councils (*l*), a High Court, from which an appeal lies to His Majesty's Court of Appeal at Zanzibar, and magistrates' and assistant magistrates' courts.

Southern Rhodesia.

**888.** The Government of Southern Rhodesia is of a somewhat complicated description. It has an administrator nominated by the British South Africa Company, assisted by a resident commissioner appointed by the Colonial Office, both being placed under the authority of the High Commissioner for South Africa (*m*). There are an executive and a legislative council, the latter partly nominated and partly elected, on each of which both the administrator and the resident commissioner have seats. The laws of the Cape Colony as existing on June 10, 1891, prevail, enforced by a High Court, with an appeal to the Supreme Court of the Cape, and a number of magistrates.

North-Western Rhodesia and Barotzeland.

**889.** North-Western Rhodesia and Barotzeland are governed by an administrator appointed by, and subject to, the direction and instructions of the High Commissioner for South Africa on the nomination of the British South Africa Company. The nomination must receive the approval of the High Commissioner, who, in default of the company to nominate within six months of a vacancy, may appoint a nominee of his own (*n*).

Uganda.

**890.** The Uganda Protectorate is under a commissioner (*o*), who makes ordinances for the administration of justice, revenue etc. It is divided into five administrative provinces, where the kings or chiefs are allowed to govern their own subjects under British supervision. Besides a High Court there are local and special courts.

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(*i*) Order in Council, dated September 26, 1901; Administrative Ordinance, January 1, 1902; Order in Council, October 22, 1906.
(*j*) Dated August 11, 1902; October 22, 1906; November 2, 1907.
(*k*) Dated January 29, 1900; November 2, 1907.
(*l*) Orders in Council of August 11, 1902; July 6, 1907.
(*m*) Orders in Council of October 20, 1898; February 16, 1903.
(*n*) Order in Council, November 28, 1899.
(*o*) Order in Council, August 11, 1902.

**891.** The Somaliland Protectorate is now, by virtue of several Orders in Council (*p*), administered by a commissioner.

Somaliland.

**892.** The Bechuanaland Protectorate is controlled by a resident commissioner under the supreme authority of the High Commissioner for South Africa (*q*).

Bechuanaland.

**893.** Northern Nigeria is, by virtue of successive Orders in Council (*r*), administered by a Governor and Commander-in-Chief, under whom are twelve residents controlling as many provinces. There is a Supreme Court, and in each province a provincial court.

Northern Nigeria.

The Southern Nigeria Protectorate is distinct from the colony of Southern Nigeria, though it is under the administration of the Governor of that colony, assisted by executive and legislative councils (*s*). Justice is administered by a Supreme Court and district courts.

Southern Nigeria.

**894.** Basutoland (*t*) and Swaziland (*u*) are controlled by resident commissioners acting under the authority of the High Commissioner for South Africa. The authority exercised by His Majesty over these protectorates is hardly distinguishable from the ordinary powers of the British Crown in British territory, all the Orders in Council assuming jurisdiction over all persons within the area of the particular protectorate, whether British subjects, or natives, or foreigners.

Basutoland. Swaziland.

**895.** The British Court at Zanzibar, together with the judge or judges of the protectorates respectively and a member of the English, Scottish, or Irish Bar of not less than five years' standing, appointed by the Secretary of State, is the court of appeal from the Protectorates of Uganda, East Africa, and Nyasaland (British Central Africa) (*a*); but the Zanzibar Protectorate itself is controlled by the Foreign Office acting through a British First Minister of the Sultan of Zanzibar.

Court of appeal from British Central Africa.

**896.** The federated Malay States constitute a protectorate of a different order, based on an agreement (*b*) with the Governments of four independent native States, by which they agreed to accept a British resident-general as agent and representative of the British Government under the Governor of the Straits Settlements, who is named High Commissioner. Each of the four States has its own native Government, by treaty with which the British Government has exclusive control over their foreign relations and jurisdiction

Federated Malay States.

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(*p*) Dated October 7, 1899; December 3, 1903; June 23, 1904; January 8, 1906.

(*q*) Orders in Council, May 9 and July 30, 1891; and see Order in Council, May 16, 1904.

(*r*) Dated December 27, 1899; February 11, 1907; March 19, 1908.

(*s*) Orders in Council of February 16, 1906; February 15, 1909.

(*t*) Order in Council, February 2, 1884.

(*u*) Orders in Council, June 25, 1903; December 1, 1906.

(*a*) Order in Council, August 11, 1902.

(*b*) Signed in July, 1895, between the Governor of the Straits Settlements on behalf of the Government of Her late Majesty and the rulers of Perak, Salangor, the Negri Sembilan, itself a confederation of States, and Pahang.

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over British subjects within their territories (*c*). These powers are exercised by a resident in each State, who is also a member of the supreme authority in the State, namely, the State Council, consisting (besides himself and, in two of the States (*d*), his secretary) of the principal native chiefs, and (in the three older States) (*e*) the principal Chinese merchants, presided over by the Sultan. The resident has under him a staff of European officers to enable him to fulfil his duties. The resident-general controls the residents, and acts as the medium of communication between the State Governments and the High Commissioner. There is a Supreme Court, comprising the judicial commissioner's court and the court of appeal, the latter consisting of two or more judicial commissioners, of whom the chief judicial commissioner is president. There are also the first and second magistrates' courts and two native courts. The administration of each State is conducted as far as possible upon the model of that of a Crown colony. All rights of suzerainty, protection, administration and control over the States of Kelantan, Trengganu, Kedah and Perlis, lying to the north and north-east of the federated States, with the islands adjacent thereto, have been transferred to the British Government by the Siamese Government (*f*), the former undertaking (*g*) that the Government of the federated Malay States shall assume the indebtedness of the transferred States to the Siamese Government.

North Borneo Protectorate.

**897.** The Governor of the Straits Settlements is also High Commissioner of Brunei, where there is a British Resident, and British Agent and Consul-General of North Borneo and Sarawak. All three places are included in the North Borneo Protectorate, whose affairs are cognisable by the Foreign Office, which controls their foreign relations and the succession in each to the position of supreme governor, but does not otherwise interfere in domestic affairs. North Borneo and Sarawak present the curious situation, abnormal from a constitutional point of view, of sovereign power vested in British subjects; the former being under the jurisdiction of the North Borneo Company, which, subject to the approval of the Secretary of State, appoints the governor, and acts by a court of directors sitting in London; the supreme power in the latter has been obtained by the uncle of the present Rajah by various acts of cession from the Sultan of Brunei between 1842 and 1905.

Johore.

The Governor of the Straits Settlements is also the channel of communication between His Majesty's Government and the protected State of Johore.

Western Pacific.

**898.** Under the Western Pacific Commission (*h*) a High Commissioner (who is always the Governor of Fiji) exercises jurisdiction

(*c*) See Engagement with Chiefs of Perak, January 20, 1874; Agreement with Independent State of Pahang, October 8, 1887; Agreement with the Rulers of Negri Sembilan, July 13, 1889.
(*d*) Perak and Selangor.
(*e*) *I.e.*, those except Pahang.
(*f*) By Treaty dated March 10, 1909, ratified July 9, 1909.
(*g*) *Ibid.*, art. 4.
(*h*) Created by Order in Council, August 13, 1877, under the Pacific Islanders Protection Acts, 1872 (35 & 36 Vict. c. 19) and 1875 (38 & 39 Vict. c. 51); and

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in the Western Pacific over all islands not within the limits of the colony of Fiji, the States of New South Wales and Queensland, or the Dominion of New Zealand, or under the protection of any civilised Power. His jurisdiction has been extended to foreigners, and (in most cases) to natives residing within the limits of the protectorate (*i*), and later to the New Hebrides and the Banks and Torres Islands (*k*). The protectorate includes the Tongan (or Friendly) Islands and Savage Island (Nieué), all rights over which have been formally renounced by the German Government (*l*). The New Hebrides are controlled, by agreement with the Government of the French Republic, by a British and a French resident commissioner acting in concert under the directions of their respective High Commissioners, with a joint court of justice (*m*).

Weihaiwei.

**899.** Weihaiwei is held under a lease granted by the Chinese Government to Great Britain (*n*). It is administered under the Colonial Office by a commissioner, by virtue of an Order in Council (*o*) authorising him to make ordinances and providing for a High Court, with an appeal to the Supreme Court of Hong Kong, and for district magistrates' courts.

# Part II.—Colonial Government.

## SECT. 1.—*The Executive.*

### SUB-SECT. 1.—*The Governor.*

Governments-in-chief.

**900.** The administration of the government of a colony is intrusted either to a Governor-General, or Governor-in-chief, or to a Governor, or to a Lieutenant-Governor or Administrator. Governors-in-chief are Governors whose commission comprises several distinct colonies. Such Governments-in-chief are—

(1) The Commonwealth of Australia, which includes the States of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia.

(2) The Dominion of Canada, which includes the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta, Saskatchewan, and the North-West Territories;

(3) Jamaica, to which Turk's Islands are attached;

(4) The Windward Islands, composed of Grenada, St. Vincent, and St. Lucia;

(5) The Leeward Islands, comprising Antigua, St. Christopher's

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the Foreign Jurisdiction Acts, 1843—1875, repealed and replaced by the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37).

(*i*) By Pacific Order in Council, March 15, 1893.

(*k*) By the New Hebrides Order in Council, November 15, 1907, art. 9.

(*l*) Convention of November 14, 1899.

(*m*) Convention of October 20, 1906.

(*n*) See Convention signed at Pekin, July 1, 1898.

(*o*) Dated July 24, 1901.

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(or St. Kitt's) and Nevis, Dominica, Montserrat, and the Virgin Islands.

Each of the Windward Islands retains its own institutions. They have neither legislature, laws, revenue, or tariff in common. They have, however, a common court of appeal, and are united for sundry other purposes, such as the maintenance of a lunatic asylum and, to a certain extent, the imprisonment of convicted criminals. They also have a common system of audit.

The Leeward Islands have one executive and one Legislative Council and one judicial establishment for the whole group, each member of which, except the last, has a local Legislative Council, which possesses concurrent legislative powers with the General Legislative Council on certain subjects, but subject to repeal or alteration by the latter. The local councils elect members from among their own numbers to sit on the General Council.

The Governor-in-Chief when present administers the government of every colony comprised in his command. When he is not present the government of the colony is administered by a governor (*p*), a lieutenant-governor (*q*) or an administrator (*r*).

Appointment of Governor.

**901.** The expression "Governor" means, as to Canada, the Governor-General, as to other British possessions, the officer administering the government (*s*), and as to the Commonwealth of Australia it will no doubt be taken to mean the Governor-General.

Governors are appointed under the sign manual or signet during His Majesty's pleasure. There are really three instruments to constitute the office of Governor: (1) Letters Patent under the Great Seal of the United Kingdom, which, it may be remarked, assume that the duties of Governor are already known and understood; (2) Instructions under the sign manual or signet; (3) the Commission appointing the officer to act according to the two previous instruments. The Governor also receives further instructions from the Secretary of State as the mouthpiece of the Crown (*t*). As a rule Governors do not remain in office in any one colony more than six years from the assumption of their duties (*u*). The appointments of provincial governors in Canada are made by the Governor-General in Council by an instrument under the great seal of Canada, which act is, within the meaning of the statute (*a*), the act of the Crown (*b*). On a Governor's death, absence, or incapability otherwise arising, the government devolves on the person designated in the charter of government or the letters patent constituting the office of Governor (*c*). It is not necessary for a Governor to be reappointed on a demise of the Crown (*d*).

(*p*) *E.g.*, in Australia.
(*q*) *E.g.*, in Canada.
(*r*) *E.g.*, in the West Indies.
(*s*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (6).
(*t*) See Keith's Responsible Government in the Dominions, 28.
(*u*) Colonial Regulations, Colonial Office List, chap. 2, s. 8, r. 103.
(*a*) British North America Act, 1867 (30 & 31 Vict. c. 3).
(*b*) *Maritime Bank of Canada* (*Liquidators*) v. *New Brunswick Receiver-General*), [1892] A. C. 437, 443, P.C.
(*c*) Colonial Regulations, Colonial Office List, chap. 1, s. 2, r. 3.
(*d*) Demise of the Crown Act, 1901 (1 Edw. 7, c. 5).

Nature of Governor's authority.

**902.** The Governor of a colony holds but a limited authority from the Crown (*e*). He cannot be regarded as a viceroy, nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and confined to the powers thereby expressly or impliedly intrusted to him (*f*). Where a territory annexed to a colony was subjected by a colonial Act to such laws, statutes, and ordinances as had already been therein proclaimed, and to such as, after the annexation, the Governor should from time to time by proclamation declare to be in force therein, it was held that the authority thus given to the Governor merely empowered him to transplant thither, and enact, laws already existing and operative in other parts of the colony (*g*). A Governor can legally take a benefit under a statute of the colony, *e.g.*, an Act of indemnity, though he is himself a necessary party to it, as in fact he is to all legislation in the colony (*h*). But he cannot be thus protected from prosecution in England on a criminal charge, such prosecutions being brought under Imperial laws which colonial legislation cannot affect (*i*). And the Governor is entitled to the bounties payable by statute (*j*) for the seizure of slaves, even though he is not the acting Governor and was absent from the colony at the time the seizure was made, inasmuch as it is he who is responsible for the institution of a good system whereby the trade in slaves may be effectually suppressed (*k*). The Governor of a colony has no power to imprison a churchwarden for not delivering up his books of accounts to his successor in office (*l*). And a grant of land by a Governor, founded upon the report of a commission, issued in pursuance of an ordinance of the colony, but inconsistent therewith, is void (*m*).

Leave of absence.

Acceptance of presents.

**903.** The Governor may on no account absent himself from the colony without His Majesty's permission (*n*). Governors and their families are prohibited during their service in the colony from receiving presents, other than the ordinary gifts of personal friends, from the inhabitants of the colony or any class of them, or from kings, chiefs, or other members of the native population in or neighbouring to the colony, unless by special permission of the Secretary of State upon a Governor's final departure from the service of the colony, nor may they give such presents. When such presents cannot be refused without giving offence, they are to be delivered up to the Government. Governors may not,

(*e*) *Cameron* v. *Kyte* (1835), 3 Knapp, 332, 343.
(*f*) *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102, 111, P .C.
(*g*) *Sprigg* v. *Sigcau*, [1897] A. C. 238, P.C.
(*h*) *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, Ex. Ch.
(*i*) See p. 532, *post*.
(*j*) Slave Trade Act, 1824 (5 Geo. 4, c. 113), s. 26; Slave Bounties Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 55), s. 1, both repealed by Slave Trade Act, 1873 (36 & 37 Vict. c. 88).
(*k*) *Re Bounties Payable in Respect of the Seizure of Certain Slaves at Sierra Leone* (1863), Brown. & Lush. 148.
(*l*) *Basham* v. *Lumley* (1828), 3 C. & P. 489.
(*m*) *R.* v. *Clarke* (1851), 7 Moo. P. C. C. 77. But as to the procedure in the case by *scire facias*, see *R.* v. *Hughes* (1866), L. R. 1 P. C. 81.
(*n*) Colonial Regulations, Colonial Office List, chap. 1, s. 2, r. 13. And see Colonial Officers (Leave of Absence) Act, 1894 (57 & 58 Vict. c. 17), s. 1.

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without special permission, forward articles for presentation to His Majesty (*o*).

Powers of Governor.

**904.** The powers of a Governor or of an officer administering the government of a protectorate are conferred by, and his duties for the most part defined in, His Majesty's commission and the instructions furnished to him. In general he is empowered (*p*)—

(1) By commission and instructions;

(1) To pardon or respite criminals, convicted in the courts of his colony (*q*), or, after consulting with the commanding officer of the forces, to pardon or respite persons imprisoned in the colony under the sentence of a court-martial. (2) To remit fines, penalties, or forfeitures accruing to His Majesty. (3) To issue warrants for the expenditure of money for the public service. (4) To grant licences for marriages, letters of administration, and probate of wills, unless other provision is made by the law of the colony (*r*). (5) In many cases to present to benefices of the Church of England in the colony. (6) To issue writs in His Majesty's name, for the election of representative assemblies and councils, to convoke and prorogue legislative bodies, and to dissolve those liable to dissolution. (7) To appoint to offices within the colony either absolutely, or temporarily and provisionally, subject to reference to His Majesty's Government. (8) In colonies possessing responsible government, to suspend or dismiss, on the advice of his council, public servants holding office during pleasure; in other colonies to suspend such officers according to regulations, and to dismiss them in certain cases. (9) To administer the appointed oaths to all persons, particularly the oath of allegiance (*s*). (10) To grant or withhold his assent to Bills passed by the legislature; to reserve certain Bills for the royal assent, or assent to them only with a clause suspending their operation till confirmed by the Crown (*t*). (11) In colonies not having representative assemblies, to initiate laws as a rule, and in many colonies having such assemblies, to initiate all measures for the appropriation of public money. (12) To repel aggression and suppress piracy to the best of his ability, and to direct his attention at all times to the state of the militia and volunteers in the colony.

(2) By statute.

**905.** In the following cases statutory authority is given to a Governor, namely:—

Pardon of convicts from outside.

(1) He may recommend felons or other offenders who have been transported to any place within his government to His Majesty for absolute or conditional pardons, and on the signification of His Majesty's approval may grant such pardons (*a*), which need not except any place from their operation (*b*).

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(*o*) Colonial Regulations, Colonial Office List, chap. 2, s. 5, rr. 46, 47, 48.
(*p*) *Ibid.*, chap. 1, s. 2, r. 13.
(*q*) Including persons imprisoned for contempt of Court (*Re Special Reference from the Bahama Islands*, [1893] A. C. 138, P. C.).
(*r*) Letters of administration and probate of wills now usually issue from the Supreme Court of the colony.
(*s*) See Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 2.
(*t*) See pp. 542, 543, *post*.
(*a*) Transportation Act, 1843 (6 & 7 Vict. c. 7), s. 2.
(*b*) *Barnett* v. *Blake* (1862), 2 Drew. & Sm. 117, 127.

(2) In the case of grants of certificates of readmission to British nationality to statutory aliens in a British possession, the powers of a Secretary of State in the United Kingdom may be exercised by the Governor (*c*). Readmission to British nationality.

(3) The requisition for the surrender of a fugitive criminal in, or suspected of being in, a British possession may be made to the Governor by any person recognised by him as consul-general, consul, vice-consul or consular officer, or governor of any colony or dependency of the State on behalf of which the requisition is made (*d*). The Governor has all the authority and powers of a police magistrate and a Secretary of State in the United Kingdom, acting together or separately, in relation to the surrender of fugitive criminals (*e*). Surrender of fugitive offenders.

(4) There are vested in Governors, lieutenant-governors, and administrators the powers and authorities of the Commissioners of Customs in relation to British possessions (*f*). Customs.

(5) His Majesty is empowered to vest in the Governor by Order in Council the fortifications, works, buildings, or lands in any colony held for the defence of the colony, and any store, yard, magazine, building, or other property in any British possession held in trust for naval purposes (whether vested in His Majesty or in the Admiralty, or in any officer), and the care and disposal of them (*g*). Defence works and naval establishments.

(6) The Governor must give leave for, and certify the expediency of, the prosecution in any of His Majesty's possessions, out of the United Kingdom, of persons not subjects of His Majesty for offences on the open sea within the territorial waters of His Majesty's dominions, although such offences were committed on board, or by means of, a foreign ship (*h*). Offences on the open sea.

(7) The Governor may authorise persons to act in a colony as justices of the peace for attesting soldiers (*i*). He may, in the absence of a superior (military) authority, competent to confirm them, confirm the finding and sentence of any court-martial held in the colony (*j*) He must approve the sentence of death passed in the colony by a court-martial, unless passed in respect of an offence committed on active service (*k*), as also a sentence of penal servitude, passed by a court-martial in the colony, for a civil offence (*l*). He may arrange with a Secretary of State for the In military matters.

(*c*) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 8.
(*d*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 17 (1); Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 7.
(*e*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 17 (2).
(*f*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 149.
(*g*) Colonial Fortifications Act, 1877 (40 & 41 Vict. c. 23), s. 1; Naval Establishments in British Possessions Act, 1909 (9 Edw. 7, c. 18), s. 1 (1). "Governor" includes lieutenant-governor, administrator, or any other person defined by the Order to be Governor (Colonial Fortifications Act, 1877 (40 & 41 Vict. c. 23), s. 3). Vesting Orders in Council have been made in the cases of Mauritius (June 26, 1879), Tasmania (March 18, 1880), Queensland (March 2, 1881), Western Australia (July 15, 1881), Cape of Good Hope (May 3, 1882), and Canada (August 18, 1882).
(*h*) Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), ss. 2, 3.
(*i*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 94.
(*j*) *Ibid.*, s. 54 (4).
(*k*) *Ibid.*, s. 54 (7).
(*l*) *Ibid.*, s. 54 (9).

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reception in the prison of the colony of military prisoners (*m*). He may declare the forces in the colony to be subject to the Army Act, as if on active service, for not more than three months, on the ground of the imminence of active service, or the recent existence of active service (*n*), and may renew such declaration for another three months (*o*). He must obtain the telegraphic consent of a Secretary of State before making this declaration, if possible, otherwise he must report the same as soon as possible to the Secretary of State (*p*).

Apprehension of fugitives.

(8) The Governor of a British possession may indorse a warrant, issued in any other part of His Majesty's dominions, for the apprehension of a fugitive from that part (*q*). He may by warrant order the return of a fugitive, committed to prison, to that part of His Majesty's dominions whence he is a fugitive, on the expiration of fifteen days from his committal, or after the decision of a superior court on a writ of *habeas corpus* issued by it, there to be dealt with in due course of law (*r*).

Vice-admiral.

(9) The Governor is *ex officio* vice-admiral in a British possession when there is not a formally appointed vice-admiral (*s*). He may fill a vacancy in the office of judge, registrar, marshal, or other officer of the vice-admiralty court until an appointment to the office is made by the Admiralty (*t*).

Mercantile marine.

(10) In every British possession the Governor occupies the place of the Commissioners of Customs in all matters relating to the registry of a ship, or of any interest in a ship, registered in the possession, and can approve a port within the possession for the registry of ships (*a*). He may, with the approval of a Secretary of State, make regulations for granting certificates of registry, terminable in six months, or any longer period, to ships not exceeding sixty tons burden (*b*).

Assistance to distressed seamen.

(11) The Governors of British possessions provide for the maintenance and passage home of—(a) any seaman or apprentice to the sea, whether His Majesty's subject or not, in distress through being discharged, left behind, or ship-wrecked, from any British ship or any of His Majesty's ships; (b) any seaman or apprentice to the sea, being His Majesty's subject, engaged in a foreign ship and in distress. Such seaman or apprentice must be put on board a British ship, in want of men, bound to the United Kingdom, or the British possession to which he belongs, or if none such be available, on board any ship, British or foreign, bound as aforesaid (*c*).

Medical inspection of seamen etc.

(12) Governors may—(a) appoint medical inspectors of seamen,

(*m*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 131 (1).
(*n*) *Ibid.*, s. 189 (2).
(*o*) *Ibid.*, s. 189 (3).
(*p*) *Ibid.*, s. 189 (4).
(*q*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 3.
(*r*) *Ibid.*, s. 6.
(*s*) Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), s. 10.
(*t*) *Ibid.*, s. 9 (2) (b).
(*a*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 89.
(*b*) *Ibid.*, s. 90.
(*c*) *Ibid.*, s. 191 (1), (2).

charge fees for their examinations, and determine their remuneration, and (b) make regulations, subject to the laws of the possession, as to the supply within the possession of anti-scorbutics for the use of ships (*d*).

Protection of steerage passengers.

They may also, by proclamation to take effect from its issue within and without the possession, (a) determine what for the purposes of Part III. of the Merchant Shipping Act, 1894, is to be deemed the length of voyage of any ship carrying steerage passengers from any port in the possession to any other port: (b) fix dietary scales for the steerage passengers during the voyage; and (c) declare what medical stores are necessary for the treatment of passengers on the voyage (*e*).

Supervision of emigrant ships.

They may also authorise surveys of emigrant ships, sailing from the possession, as required in the case of emigrant ships sailing from the British Islands, and may appoint medical practitioners on board emigrant ships proceeding on colonial voyages (*f*).

The Governor of each of the Australian States, and of the Dominion of New Zealand, and of any State hereafter to be established in Australia, may make rules for determining the number of steerage passengers to be carried in any emigrant ship between the States and the Dominion, and for determining on what deck, and subject to what reservations and conditions, they may be carried (*g*).

Asiatic or African steerage passengers.

The Governor of any British possession may declare by proclamation, to take effect from the date of its issue, or any other day named therein, without as well as within the possession, that ships, to pass within the Tropics from any port in the possession, may convey Asiatic or African steerage passengers, at the rate of one for every twelve superficial feet of the passenger deck (*h*).

Responsibility of Governor for his acts etc.

**906.** A Governor is responsible for acts of a private character committed by him in his colony, and may be sued for them both in the colonial courts (*i*) and in England (*k*). But apparently he cannot be held liable, in any court, for acts within the limits of his commission done under the authority of the Crown (*l*).

(1) Civilly;

He cannot be compelled to produce, on an application for discovery, for the purposes of the trial of an action (*m*), official documents acquired and held by him in his capacity of Governor, and subject to the directions of His Majesty's Secretary of State for the Colonies. Amongst such documents are copies of despatches, reports, and other communications between himself as Governor and His Majesty's Secretary of State, or between himself as Governor and the Royal Commissioner appointed by His Majesty to inquire into the

(*d*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 205.
(*e*) *Ibid.*, s. 366 (1), (2).
(*f*) *Ibid.*, s. 366 (3), (4).
(*g*) *Ibid.*, s. 367 (1); Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12), s. 6.
(*h*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 367 (2), (3).
(*i*) *Hill* v. *Bigge* (1841), 3 Moo. P. C. C. 465.
(*k*) *Mostyn* v. *Fabrigas* (1775), 1 Cowp. 161; and see 1 Smith, L. C., 11th ed., 591; *Glynn* v. *Houston* (1841), 2 Man. & G. 337.
(*l*) See *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102, 107, 111, P. C.
(*m*) Nor apparently at the trial itself.

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affairs of the colony, or between the Royal Commissioner and the Secretary of State (*n*); and official communications between the Governor and his subordinate officers, civil or military, cannot be called for in actions against the Governor (*o*).

(2) Criminally.

**907.** Any Governor charged with oppressing any of His Majesty's subjects, or committing any other crime or offence within his command, may be tried before any competent court in England (*p*). And any Governor (or any other official or ex-official) charged with committing a breach of official trust anywhere within or without His Majesty's dominions may be brought to trial either before any competent British court in the place where the offence is alleged to have been committed, or in England before the High Court or the Central Criminal Court (*q*).

Disability. Pensions.

**908.** Governors and deputy-governors of colonies cannot be elected to, or sit or vote in, the House of Commons (*r*). Upon retirement Governors are entitled to pensions (*s*).

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(*n*) *Hennessy* v. *Wright* (1888), 21 Q. B. D. 509.

(*o*) *Wyatt* v. *Gore* (1816), Holt (N. P.), 299; *Cooke* v. *Maxwell* (1817), 2 Stark. 183.

(*p*) Stat. (1699) 11 & 12 Will. 3, c. 12; the Criminal Jurisdiction Act, 1802 (42 Geo. 3 c. 85); *R.* v. *Picton* (1812), 30 State Tr. 225; *R.* v. *Eyre* (1868), L. R. 3 Q. B. 487. The latter of the above-mentioned Acts does not extend to felonies (*R.* v. *Shawe* (1816), 5 M. & S. 403), and under it the trial can only be held before the King's Bench Division of the High Court.

(*q*) See Official Secrets Act, 1889 (52 & 53 Vict. c. 52), ss. 2, 6. A breach of official trust is defined (s. 2) to be the communication of any document, sketch, plan, or model, or of any information obtained or controlled or acquired by means of holding or of having held any office under His Majesty to any person against the interest of the State or the public, or the attempt at such communication. Prosecutions require the consent of the Attorney-General or person exercising in a court outside the United Kingdom the like functions as the Attorney-General in England (*ibid.*, s. 7).

(*r*) Succession to the Crown Act, 1707 (6 Ann. c. 41), s. 24.

(*s*) Governors who have attained the age of sixty years, and who either—(a) have administered colonial governments for periods amounting in the whole to eighteen years, or (b) have administered colonial governments for ten years, and been employed either in such administrations or in His Majesty's permanent Civil Service for periods amounting in the whole to twenty-five years, or (c) have administered colonial governments for fifteen years and are incapable, from infirmity likely to be permanent of body or mind contracted during their service, of discharging public duties, are entitled to pensions at the full rate, amounting to (a) £1,000 after service as governor for four years where the salary is not less than £5,000 per annum, (b) £750 after similar service on a salary not less than £2,500, (c) £500 after similar service on a salary not less than £1,200, and (d) £250 in other cases (Colonial Governors (Pensions) Act, 1865 (28 & 29 Vict. c. 113), ss. 2, 4). Governors who have attained the age of sixty years, and who after forty years of age—(a) have administered a colonial government for twelve years, or (b) have administered a colonial government for eight years, and been employed in a colonial administration, or in His Majesty's permanent civil service, for twenty years, or (c) who have administered colonial governments for ten years and are incapable, from infirmity likely to be permanent of body or mind, of discharging public duties, are entitled to pensions at the reduced rate, amounting to two-thirds of the full rate (*ibid.*, ss. 3, 5). Additions may be made to the reduced rate of a fraction of the full rate according to age and length of service (Colonial Governors (Pensions) Act, 1872 (35 & 36 Vict. c. 29), s. 3). Provision is made for deductions in the case of Governors receiving half-pay for public service in His Majesty's dominions (Colonial Governors (Pensions) Act, 1865 (28 & 29 Vict.

**909.** The Governor is assisted in carrying on the government of the colony by an Executive Council. In colonies possessing responsible government the Governor is empowered to appoint and remove members of the Executive Council, the understanding being that councillors who have lost the confidence of the legislature will tender their resignation to the Governor, or discontinue the practical exercise of their functions on the analogy of the constitutional practice of the United Kingdom (*a*). In Canada the Executive Council is called the King's Privy Council for Canada, comprising members who are in the Cabinet and members who are not; and in some of the other Dominions the name "cabinet" is used to signify the members of the Executive Council actually holding office and assisting in the government. When the Executive Council assumes the form of a Cabinet responsible to the legislature, its members cease to assemble for consultation and discussion with the Governor sitting as president (*b*), except for purposes expressly required by law or to hold consultations apart from party politics (*c*). On all questions of ministerial policy the Council, like the Cabinet Council of the United Kingdom, deliberate in private. Their recommendations are sent to the Governor for consideration, and discussed if necessary between him and the Premier, and made operative by being marked "approved" by the Governor.

In self-governing colonies.

**910.** In Crown colonies the Executive Council consists of certain principal officers of the Government, with or without the addition of unofficial members. These Executive Councillors are either the holders of offices specified in the Governor's instructions, or persons appointed in pursuance either of a royal warrant or of instructions from the Crown signified through a Secretary of State. The Governor may in cases of vacancies make provisional appointments subject to the confirmation of the Crown. Executive Councillors can be dismissed only by the Crown, but in case of urgency may be suspended by the Governor, who must, however, at once report

In Crown colonies.

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c. 113), s. 7). In the case of a Governor not entitled to a pension as such being employed in His Majesty's permanent Civil Service, the years of his service as Governor shall be reckoned for the computation of his superannuation allowance (under the Superannuation Act, 1859 (22 Vict. c. 26)) as though passed in the Civil Service, and the allowance will be computed at the rate of salary and emoluments last received in that service (Colonial Governors (Pensions) Act, 1865 (28 & 29 Vict. c. 113), s. 10; Pensions (Colonial Service) Act, 1887 (50 & 51 Vict. c. 13), s. 4). But no pension may amount, together with a Civil Service pension of the State or a colony, to more than £1,000, or two-thirds of the Civil Service salary and emoluments, whichever is the greater (Pensions (Colonial Service) Act, 1887 (50 & 51 Vict. c. 13), s. 3). Officers transferred from His Majesty's Civil Service to governorships of colonies may be granted superannuation allowances on the expiration of the term of such offices without a renewal of public employment, but they are liable, while under sixty, to service under the Crown (Superannuation Act, 1859 (22 Vict. c. 26), s. 12). The Pension Acts apply to the High Commissioner of Cyprus as if Cyprus was a British colony (Pensions (Colonial Service) Act, 1887 (50 & 51 Vict. c. 13), s. 5).

(*a*) See Colonial Regulations, Colonial Office List, chap. 1, s. 3, r. 22.

(*b*) Except, apparently, in Newfoundland.

(*c*) Todd, Parliamentary Government in the British Colonies, 2nd ed., 47 *et seq.*

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fully to the Secretary of State the grounds of his action (*d*). In Barbados an Executive Committee of the members of the two Houses of the legislature sits with the members of the Colonial Executive to initiate money votes, prepare the estimates, and introduce Government business. In the Bahamas and in Bermuda the members of the colonial legislature are added to the ordinary members of the Executive Council. These arrangements are made with a view to reconcile the natural opposition of the executive and legislative powers in colonies which still remain under representative, as distinguished from complete responsible, government (*e*).

Relations to Civil Service.

**911.** The Executive Council together with the Chief Justice of the colony administer the oaths of office to the Governor on his arrival in the colony, and to the officer administering the colony during his absence, and the members themselves each take the oaths of office on their appointment. The Governor and Council have power by statute (*f*) to remove persons holding offices granted or grantable by patent for absence without reasonable cause, neglect of duty, or misbehaviour in their office, including judicial officers (*g*). In the absence of special contract, Crown servants in the colonies hold their offices during pleasure only, the regulations in the Colonial Office List not amounting to a contract between them and the Crown, but being alterable without their consent (*h*). In New South Wales an Act was passed (*i*) restricting the power of the Crown to dismiss summarily at pleasure, though it did not take away the Crown's right to abolish a civil office, and without compensation, unless the holder was entitled to a superannuation allowance under it (*k*). The restriction was repealed by a subsequent Act (*l*), the operation of which, however, was not allowed to be retrospective (*m*). An agent of the Crown is not personally liable on any contract entered into by him on behalf of the Crown, and cannot be made so by any doctrine of implied warranty that the contract will run its full length (*n*). And a contract for military service by a colonial Government is made on behalf of the Crown. Hence payments by the Crown through the Imperial Government are part payments under the contract which enure to the benefit of the colonial Government (*o*).

No persons employed in the public service of any colony, except

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(*d*) See Colonial Regulations, Colonial Office List, chap. 1, s. 3, r. 23.
(*e*) See Keith, Responsible Government in the Dominions, 5.
(*f*) Colonial Leave of Absence Act, 1782 (22 Geo. 3, c. 75), s. 2.
(*g*) *Willis* v. *Gipps* (*Sir G.*) (1846), 5 Moo. P. C. C. 379; *Montagu* v. *Van Diemen's Land* (*Lieutenant-Governor*) (1849), 6 Moo. P. C. C. 489.
(*h*) *Re New South Wales* (*Governor-General*), *Ex parte Robertson* (1858), 11 Moo. P. C. C. 288; *Shenton* v. *Smith*, [1895] A. C. 229, P. C.; *Dunn* v. *R.*, [1896] 1 Q. B. 116, C. A.
(*i*) Civil Service Act, 1884 (48 Vict., No. 24).
(*k*) *Young* v. *Waller*, [1898] A. C. 661, P. C.
(*l*) Public Service Act, 1895 (59 Vict., No. 25).
(*m*) *Young* v. *Adams*, [1898] A. C. 469, P. C.
(*n*) *Dunn* v. *Macdonald*, [1897] 1 Q. B. 555, C. A.
(*o*) *Williams* v. *Howarth*, [1905] A. C. 551, P. C.

those specified below, may be absent from the colony except in accordance with rules framed by the Secretary of State (*p*).

## SECT. 2.—*The Legislature.*

### SUB-SECT. 1.—*Powers and Privileges of Colonial Legislatures.*

Definition and nature of powers.

**912.** A colonial legislature is the authority, other than the Imperial Parliament or His Majesty in Council, competent to make laws for a British possession (*q*). It is a legislature restricted in the area of its powers, but within that area unrestricted. When an Act of Parliament enacts that there shall be a legislature for a colony, and that its Legislative Assembly shall have exclusive authority to make laws for the colony, it confers power not in any sense to be exercised by delegation from, or as agent of, the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed, as the Imperial Parliament, in the plenitude of its power, possessed and could bestow. Within these limits the local legislature is supreme, and has the same authority as the Imperial Parliament (*r*). This principle applies to the legislatures of the Provinces of Canada equally with the Dominion Parliament (*s*). Accordingly a confirmed Act of a local legislature lawfully constituted, whether in a settled or a conquered colony, has, as to matters within its competence and within the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by Imperial legislation (*t*).

Legislative assembly permanent.

**913.** The expression "legislative assembly" in a colonial Act (*u*) means, in the ordinary use of the term, the assembly created by the constitution, which though liable to be dissolved, or to expire by effluxion of time, is an essential part of the constitution of the colony, and must be regarded as a permanent body (*a*).

With relation to absentees.

**914.** A colonial legislature, empowered to make laws not repugnant to the laws of England, for the peace, order, and good government of the colony (*b*), can subject to its judicial tribunals persons who neither by themselves nor by their agents are present in the colony; and may authorise the courts of the colony to decide whether they will or will not proceed, in the absence of the

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(*p*) Colonial Officers (Leave of Absence) Act, 1894 (57 & 58 Vict. c. 17), s. 1. The exceptions are—Dominion of Canada, Newfoundland, Cape, Natal, New South Wales, Victoria, Queensland, Tasmania, South Australia, Western Australia, New Zealand, and any others named in any Order in Council extending the Act. The Commonwealth of Australia and the Transvaal were added to the list by Order in Council of February 11, 1907.

(*q*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (7).

(*r*) See *Powell* v. *Apollo Candle Co.* (1885), 10 App. Cas. 282, 290, P. C.

(*s*) See *Hodge* v. *R.* (1883), 9 App. Cas. 117, P. C.

(*t*) *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, Ex. Ch., *per* WILLES, J., at p. 20.

(*u*) *E.g.*, for making allowances to parliamentary representatives.

(*a*) See *A.-G. for New South Wales* v. *Rennie*, [1896] A. C. 376, P. C.

(*b*) *E.g.*, New Zealand, by New Zealand Constitution Act, 1852 (15 & 16 Vict. c. 72).

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defendant, in any case of contracts made or to be performed in the colony (*c*).

Limitation of powers.

**915.** Any colonial law (*d*) which is repugnant to any Act of Parliament extending to the colony to which such law relates, or which is repugnant to any order or regulation made under the powers of, and having the force of, such Act in the colony, is void to the extent of such repugnancy (*e*). The repugnancy, however, must be to the provisions of some Act of Parliament applicable to the colony, by express words or necessary intendment (*f*). Hence the validity of colonial laws is subject to examination by the colonial courts, and by the Judicial Committee of the Privy Council (*g*). And the obvious meaning and purpose of the Colonial Laws Validity Act are to preserve the right of the Imperial Legislature to legislate for a colony, although a local legislature has been given, and to make it impossible, when an Imperial statute has been passed expressly for the purpose of governing that colony, for the colonial legislature to enact anything repugnant to the express law applied to that colony by the Imperial Legislature itself (*h*).

Self-protection.

**916.** Without express grant, a colonial legislature possesses no power to protect itself against obstruction, interruption, or disturbance of the proceedings by misconduct of any of the members in the course of those proceedings, except such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute. Whatever in a reasonable sense is necessary for those purposes is impliedly granted, whenever any such legislative body is established by competent authority. For these purposes protective and self-defensive powers only, and not punitive, are necessary (*i*). Therefore Legislative Assemblies in the British colonies have, in the absence of express grant, no power to adjudicate upon, or punish for, contempts committed either in their presence (*k*) or beyond their presence (*l*).

Adoption of privileges etc. of House of Commons of United Kingdom.

Powers, however, to adopt as their own the privileges, powers, and immunities of the House of Commons of the United Kingdom have been expressly granted to the Dominion (*m*) and to the Provinces (*n*) of Canada; to the Commonwealth of Australia (*o*), and

(*c*) *Ashbury* v. *Ellis*, [1893] A. C. 339, P. C. See also *Woodruff* v. *A.-G. for Ontario*, [1908] A. C. 508, P. C.

(*d*) Including laws made for the colony by His Majesty in Council.

(*e*) Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 2.

(*f*) *Ibid.*, s. 1.

(*g*) See, *e.g.*, *L'Union St. Jacques de Montreal* v. *Bélisle* (1874), L. R. 6 P. C. 31; *Dobie* v. *Temporalities Board* (1882), 7 App. Cas. 136, P. C.; *A.-G. of Ontario* v. *A.-G. for the Dominion of Canada*, [1894] A. C. 189, P. C.; *A.-G. for Ontario* v. *Hamilton Street Rail.*, [1903] A. C. 524, P. C.

(*h*) *Re R.* v. *Marais*, *Ex parte Marais*, [1902] A. C. 51, 54, P. C.

(*i*) *Barton* v. *Taylor* (1886), 11 App. Cas. 197, 203, P. C. Compare *Kielley* v. *Carson* (1842), 4 Moo. P. C. C. 63, 88.

(*k*) *Doyle* v. *Falconer* (1866), L. R. 1 P. C. 328.

(*l*) *Fenton* v. *Hampton* (1858), 11 Moo. P. C. C. 347

(*m*) Parliament of Canada Act, 1875 (38 & 39 Vict. c. 38), s. 1. See Revised Statutes of Canada, 49 Vict. c. 11.

(*n*) British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92. See *Fielding* v. *Thomas*, [1896] A. C. 600, 610, P. C.

(*o*) Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12), art. 49.

to Victoria (*p*), Western Australia (*q*), and South Australia (*r*); to the Transvaal (*s*), the Orange River Colony (*t*), and Natal (*a*); and indeed to every colony whose legislature comprises a legislative body of which one half is elected by the inhabitants of the colony (*b*). A standing order of the Legislative Assembly of New South Wales, empowering the House to suspend from its service a member charged with an offence until verdict or further order, is within the power conferred by the Constitution Act, 1902 (*c*) to prepare and adopt standing rules and orders regulating the orderly conduct of the Assembly, the House being the sole judge of the occasion requiring its enforcement, and a court of law being incompetent to question its validity so long as it relates to orderly conduct in the House (*d*). But a standing order of a Legislative Assembly adopting the rules, forms, and usages of the Imperial Parliament naturally signifies only those then existing, and cannot be taken to adopt by anticipation all future changes in the procedure or practice of the House of Commons (*e*).

Effect of receiving legislative institutions.

**917.** After a colony or settlement has received legislative institutions the Crown stands, subject to the special provisions of any Act of Parliament, in the same relation to it as it does to the United Kingdom (*f*).

The Church of England in the colonies.

This principle is well illustrated by the position occupied by the Church of England in the colonies. In a Crown colony properly so called, or in cases where the letters patent are issued in pursuance of an Act of Parliament, a bishopric may be constituted and ecclesiastical jurisdiction conferred by the sole authority of the Crown. But after the establishment of an independent legislature in a colony there is no power in the Crown, solely by virtue of its prerogative, to establish there a metropolitan see and province, or to create any ecclesiastical corporation, whose status, rights, and authority the colony can be required to recognise, any more than there is in the United Kingdom. As in the United Kingdom a bishopric may be constituted with ecclesiastical jurisdiction under the authority of an Act of Parliament (*g*), so in a colony having an independent legislature the legal status and authority of a bishop

(*p*) Victoria Constitution Act, 1855 (18 & 19 Vict. c. 55), schedule, art. 35. See *Dill* v. *Murphy* (1864), 1 Moo. P. C. C. (N. S.) 487; *Legislative Assembly of Victoria* (*Speaker*) v. *Glass* (1871), L. R. 3 P. C. 560.

(*q*) Western Australia Constitution Act, 1890 (53 & 54 Vict. c. 26), schedule, art. 36.

(*r*) Constitution Act (No. 2 of 1855-6), s. 35.

(*s*) Transvaal Constitution Letters Patent, 1906, art. xxxiii.

(*t*) Orange River Colony Constitution Letters Patent, 1907, art. xxxv. The colony is now the Orange Free State, see p. 513, *ante*.

(*a*) Constitution Act, 1893 (No. 14 of 1893), s. 42, and Privileges of Parliament Act, 1895 (No. 27 of 1895).

(*b*) Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), ss. 1, 5. See *Fielding* v. *Thomas*, [1896] A. C. 600, P. C., at p. 610.

(*c*) Constitution Act, 1902 (No. 32 of 1902), s. 15.

(*d*) *Harnett* v. *Crick* [1908], A. C. 470, P. C.

(*e*) *Barton* v. *Taylor* (1886), 11 App. Cas. 197, 202, P. C.

(*f*) *Re Natal* (*Bishop*) (1864), 3 Moo. P. C. C. (N. S.) 115, 148.

(*g*) *E.g.* by Ecclesiastical Commissioners Act, 1847 (10 & 11 Vict. c. 108); Bishoprics Act, 1878 (41 & 42 Vict. c. 68).

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may be confirmed and established by an Act of the colonial legislature duly assented to by the Crown (*h*).

Not part of the constitution.

The Church of England in the colonies is not part of the constitution in any colonial settlement; it is in the same position as any other religious body, and, save in so far as it may be established by law, its authorities and officers cannot claim to be recognised by the law of the colony, otherwise than as the members of a voluntary association (*i*). No ecclesiastical tribunal is required in any colony or settlement where there is no established Church; the ecclesiastical law of England cannot, therefore, in a settled colony in which the Church of England is not established be treated as a part of the law which settlers carry with them from the mother country (*k*).

Essential conditions of colonial branch of Church of England.

Persons who found a Church in any colony having an established legislature, and call themselves members of the Church of England, will be presumed to be members of that Church; they will be bound by its doctrines, rules, ordinances, and discipline, and obedience to them will be enforced by the civil tribunals of the colony; questions at issue will be tried by the civil tribunals in the same way as if such questions were tried in England, though in different tribunals. But the mere fact of a Church declaring itself to be in communion with the Church of England does not make it part of that Church, nor its members members of that Church (*l*), and a substantial identity in their standards of faith and doctrine is necessary to establish a connection between the Church of England as by law established and another Church. General expressions affirming in the strongest way the connection of a colonial Church with the Church of England, and its adherence to that Church's faith and doctrine, are unavailing to prove that the former is a Church in connection with the Church of England, if a substantial element in the constitution of the colonial Church consists in the exclusion of a substantial element in the constitution of the Church of England (*m*). A synod of a Church, although it may meet and pass various acts and constitutions, has no power, without the consent either of the Crown or of the colonial legislature, to bind persons not in any way subject to its control, or to establish courts of justice for temporal as well as for spiritual matters (*n*).

(*h*) When a bishop was appointed in Jamaica by letters patent in 1824, the legal status and authority of the bishop were confirmed and established by an Act of the colonial legislature duly assented to by the Crown; and see *Re Natal (Bishop)* (1864), 3 Moo. P. C. C. (N. S.) 115, 148—151.

(*i*) *Ibid.* See, generally, title ECCLESIASTICAL LAW.

(*k*) *Re Natal (Bishop)* (1864), 3 Moo. P. C. C. (N. S.) 115, 152.

(*l*) *Natal (Bishop)* v. *Gladstone* (1866), L. R. 3 Eq. 1, 37—38.

(*m*) As by providing that in the interpretation of its standards and formularies the Church shall not be bound by any decisions in questions of faith and doctrine, or in questions of discipline relating to faith and doctrine, other than those of its own ecclesiastical tribunals, or of such other tribunals as may be accepted by the provincial synod as tribunals of appeal; meaning that its tribunals shall not take the English decisions on the subject as authoritative. In England the standard is the formularies of the Church judicially interpreted; in the colony it is the formularies as they may be construed without that interpretation (see *Merriman* v. *Williams* (1882), 7 App. Cas. 484, P. C.).

(*n*) *Long* v. *Cape Town (Bishop)* (1863), 1 Moo. P. C. C. (N. S.) 411, 464; compare *Cape Town (Bishop)* v. *Natal (Bishop)* (1869), L. R. 3 P. C. 1.

Appointment of colonial bishop.

The Crown may grant letters patent creating a bishopric in places where it is not forbidden by statute, and thereby confer upon the bishop powers, some of which he may legally exercise, and others of which he may be unable legally to exercise. But the assumption to confer such excess of power does not render the letters patent wholly invalid, or vitiate that portion of them which confers powers that may be lawfully exercised. A colonial bishop so appointed may exercise all the duties and functions and perform all the acts belonging to a bishop within his diocese that he could if he were bishop of an English diocese; but he cannot enforce execution of his orders without having recourse to the civil tribunals for that purpose (*o*).

Colonial legislation *per se*, intra-territorial.

**918.** The jurisdiction of colonial legislatures is confined to the territories of their colonies respectively. The maxim *Extra territorium jus dicenti impune non paretur* applies to attempts to enact laws relating to offences committed in other countries (*p*). But the propriety or impropriety of passing an Act of Parliament in a colony cannot be questioned on appeal to the Sovereign in Council (*q*).

Powers conferred on colonial legislatures by Imperial statute.

**919.** Colonial legislatures are explicitly empowered by Imperial statute to make laws—

(1) For the admission in the courts of the colonies of the evidence of barbarous and uncivilised persons, destitute of the knowledge of God or of any religious belief (*r*); (2) For the establishment, maintenance, and regulation of inland posts (*s*); (3) For the trial within the limits of British possessions of charges arising out of the death of persons beyond such limits from injuries received within such limits (*a*); (4) For the establishment, abolition, reconstruction, and alteration of the constitutions of courts of justice (*b*); (5) For validating within all parts of His Majesty's dominions marriages contracted in British possessions, if both the parties are by English law competent to marry each other (*c*); (6) For imparting the privileges of naturalisation to be enjoyed within the limits of the particular British possessions (*d*); (7) For reducing any fine recovered on summary conviction under the Army Act (*e*); (8) For declaring any court of unlimited civil jurisdiction in a British possession a colonial Court of Admiralty, and providing for the exercise of its jurisdiction, and for conferring partial or limited

(*o*) *Natal* (*Bishop*) v. *Gladstone* (1866), L. R. 3 Eq. 1. Since the decisions in *Long* v. *Cape Town* (*Bishop*) (1863), 1 Moo. P. C. C. (N. S.) 411, and in *Re Natal* (*Bishop*) (1864), 3 Moo. P. C. C. (N. S.) 115, the Government have discontinued the issue of letters patent to bishops in colonies possessing an independent legislature.

(*p*) *Macleod* v. *A.-G. for New South Wales*, [1891] A. C. 455, P. C., *per* Lord HALSBURY, L.C., at p. 458.

(*q*) *Tilonko* v. *A.-G. of Natal*, [1907] A. C. 93, 95, 461, P. C.

(*r*) Colonial Evidence Act, 1843 (6 & 7 Vict. c. 22), s. 1.

(*s*) Colonial Inland Post Office Act, 1849 (12 & 13 Vict. c. 66), s. 1.

(*a*) Admiralty Offences (Colonial) Act, 1860 (23 & 24 Vict. c. 122), s. 1.

(*b*) Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 5.

(*c*) Colonial Marriages Act, 1865 (28 & 29 Vict. c. 64), s. 1.

(*d*) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 16.

(*e*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 169.

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Admiralty jurisdiction on any inferior court (*f*); (9) For conferring authority on any court in a British possession to conduct inquiries into shipwrecks and other shipping casualties, or as to charges of incompetence or misconduct on the part of masters, mates, or engineers of ships, in certain circumstances (*g*); (10) For applying and adapting any of the provisions of Part II. of the Merchant Shipping Act, 1894, to registered British ships trading or being at any port in a British possession, and to the owners, masters, and crews thereof (*h*).

Regulation and amendment of constitution.

Every colonial representative legislature has power to make laws respecting its constitution, powers, and procedure, in accordance with the law of the colony (*i*); and the following colonies are expressly empowered to make laws altering their constitution :—New South Wales, South Australia, Victoria, Western Australia, Tasmania (*k*). The legislature of each of the six Australian States is also empowered to regulate customs duties on goods coming from the other States and from New Zealand (*l*).

Construction of colonial legislation.

**920.** The legislation of colonies where the English common law prevails is governed by the same rules of construction as apply in England, and the decisions of English courts on similar English legislation are authorities for the interpretation of colonial legislation (*m*). A colonial statute should not be construed to act retrospectively unless the intention of the legislature to that effect is expressed in plain and unambiguous terms. It is obviously unjust to make an act, legal at the time it is done, illegal by some new law, or to make lawful an act which was wrongful when done, and thus deprive the person injured of the remedy the law originally gave him (*n*).

Nor should a colonial statute be deemed to extinguish or take away a right or property without compensation unless it appear by express words or by plain implication that it was the intention of the legislature to do so (*o*)

Legislation of the United Kingdom must not unnecessarily be held to extend to the colonies, and thereby overrule or qualify or add to their own legislation on the same subject (*p*).

Codification.

**921.** In some colonies the general law has been codified; and civil codes, criminal codes, codes of civil procedure, and codes of

(*f*) Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), s. 3. But such legislation must, unless previously approved by His Majesty through a Secretary of State, be reserved for the signification of His Majesty's pleasure, or contain a suspending clause (*ibid.*, s. 4).

(*g*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 478.

(*h*) *Ibid.*, s. 264.

(*i*) Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 5.

(*k*) See Acts referred to at pp. 506 *et seq.*

(*l*) Australian Colonies Duties Act, 1873 (36 Vict. c. 22), s. 3.

(*m*) *Catterall* v. *Sweetman* (1845), 1 Rob. Eccl. 304, 318.

(*n*) *Young* v. *Adams*, [1898] A. C. 469, 476, P. C.

(*o*) *Western Counties Rail. Co.* v. *Windsor and Annapolis Rail. Co.* (1882), 7 App. Cas. 178, 188, P. C.; *Commissioner of Public Works* (*Cape Colony*) v. *Logan*, [1903] A. C. 355, 363, P. C.

(*p*) *New Zealand Loan and Mercantile Agency Co.* v. *Morrison*, [1898] A. C. 349, 357, P. C.

criminal procedure are in force, while in others the law as to particular subjects, such as bills of exchange, has been codified (*q*). In most colonies also the statute law has been from time to time revised and published in the form of statutes revised (*r*).

SUB-SECT. 2.—*Special Features of Colonial Legislation.*

Form and nomenclature.

**922.** In colonies possessing representative assemblies laws purport to be made by the Sovereign, or by the Governor on his behalf, or sometimes by the Governor alone, with the advice and consent of the Council and Assembly, or of the Senate and House of Representatives, or as the case may be, the Governor having the right of veto. They are almost invariably designated Acts. In colonies not having such assemblies laws purport to be made by the Governor, with the advice and consent of the Legislative Council, (or in British Guiana the Court of Policy), and are designated ordinances or laws. In Protectorates legislative enactments are usually designated proclamations.

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(*q*) Ceylon has a Penal Code (1883), a Code of Civil Procedure (1889), and a Code of Criminal Procedure (1898); Cyprus has the Méjéle or Ottoman Civil Code, a Land Code based on Mahomedan law, a Penal Code based on the French Code Pénal, and a Commercial Code, also based on the French Code; the Gold Coast has a Criminal Code and a Code of Criminal Procedure; Grenada has a Code of Civil Procedure (Ordinance 16 of 1882), a Criminal Code (Ordinance 2 of 1897), and a Code of Criminal Procedure (Ordinance 3 of 1897); Hong Kong has a Code of Civil Procedure (Ordinance 5 of 1901); Jamaica has a Code of Civil Procedure based on the Supreme Court Rules, 1883; Malta has a Penal Code; Mauritius has the French Civil, Civil Procedure, and Commercial Codes; Ordinance 6 of 1838 (commonly called the Penal Code) is mainly borrowed from the French Code Pénal; Natal has a Native Code (Law 19 of 1891); New South Wales has a Criminal Code (Act 40 of 1900); the Orange River Colony has a Code of Criminal Procedure (Ordinance 12 of 1902); Quebec has the Civil Code of Lower Canada, which came into force 1st August, 1866, and a Code of Civil Procedure, which came into force 28th July, 1867; Queensland has a Criminal Code (Act 9 of 1899), which came into force 1st January, 1901; St. Lucia has a Civil Code, a Code of Civil Procedure, a Criminal Code, and a Code of Criminal Procedure; St. Vincent has a Code of Civil Procedure (Ordinance 3 of 1884); the Seychelles have the Codes of Mauritius and a Code of Civil Procedure (1878); Southern Nigeria has a Code of Criminal Procedure (Ordinance 7 of 1900); the Straits Settlements have a Penal Code (Ordinance 4 of 1871), a Code of Criminal Procedure (Ordinance 22 of 1900), and a Code of Civil Procedure (Ordinance 31 of 1907); the Transvaal has a Code of Criminal Procedure (Ordinance 1 of 1903); the Turk's and Caicos Islands have a Code of Civil Procedure (Ordinance 6 of 1903) and a Code of Criminal Procedure (Ordinance 7 of 1903), Western Australia has a Criminal Code (Act 14 of 1901-2), which came into force 1st May, 1902; Northern Nigeria (1904) and Bermuda (1907) both have Criminal Codes founded on the Queensland Code; New Zealand has a Criminal Code (Act 56 of 1893); the Indian Codes of Civil and Criminal Procedure and the Penal Code are in force in East Africa, Uganda, and Somaliland. Most of these Codes have been modified by subsequent legislation. The laws have been consolidated in the following Colonies:—British Columbia (1897), British Honduras (1886), Newfoundland (1892), and Ontario (1897).

(*r*) This has been done, for example, in the Dominion of Canada (1906), the Cape of Good Hope (1895), Fiji (1905), Gambia (1900), the Gold Coast (1903), Manitoba (1891), Nova Scotia (1900), the North-West Territories (1905), Quebec (1888), St. Lucia (1889), Southern Nigeria (1907), Hong Kong (1901), Gibraltar (1890), Straits Settlements (1898), Natal (1899), Cyprus (1906), Ceylon (1907), Bermuda (1902), British Guiana (1905), Mauritius (1905), Grenada (1897), Bahamas (1899), and Trinidad (1905).

SECT. 2. The Legislature.

Date of operation.

A colonial law comes into operation immediately on receiving the Governor's assent, unless some other date is prescribed by the law itself, or unless it contains a suspending clause. The Crown, however, retains power to disallow it; and if this power is exercised the law ceases to have operation from the date at which notification of such disallowance is published in the colony (*s*).

Disallowance by Crown.

**923.** Laws passed by most of the Crown colonies and protectorates may be disallowed by the Crown at any subsequent time (*t*). But disallowance can only take place—

In the case of laws passed by the Dominion of Canada (*u*), within two years of the receipt by the Secretary of State from the Governor-General of a copy of the Act;

In the case of laws passed by the Provinces of Canada (*v*), within one year after such receipt by the Governor-General from the Lieutenant-Governor;

In the case of laws passed by the Commonwealth of Australia (*w*), within one year from the Governor-General's assent;

In the case of laws passed by New South Wales (*x*), Victoria (*y*), Queensland (*z*), Western Australia (*a*), New Zealand (*b*), and Cape Colony (*c*), within two years from the receipt by the Secretary of State from the Governor of a copy of the law; by Natal (*d*), the Transvaal (*e*), and the Orange River Colony (*f*), within two years from the Governor's assent.

In the case of laws passed by the Parliament of the Union of South Africa, within one year after they have been assented to by the Governor-General (*g*).

Suspending clause.

**924.** Colonial laws are in some cases passed with suspending clauses; that is, although assented to by the Governor, they do not come into operation or take effect in the colony until His Majesty's pleasure (*i.e.*, not to disallow them) has been signified (*h*).

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(*s*) Colonial Regulations, chap. 1, s. 3, r. 19.

(*t*) There are exceptions. Disallowance must take place, if at all, within two years from the receipt by the Secretary of State of a copy of the law in the case of Jamaica and Mauritius, within eighteen months from such receipt in the case of the Leeward Islands, and within two years from the Governor's assent in the case of Malta. In Gibraltar disallowance can take place at any time, and if His Majesty's pleasure is not signified within three years, the ordinance is deemed to be disallowed.

(*u*) British North America Act, 1867 (30 & 31 Vict. c. 3), s. 56.

(*v*) *Ibid.*, s. 90.

(*w*) Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12), schedule, art. 59.

(*x*) New South Wales Constitution Act, 1855 (18 & 19 Vict. c. 54), s. 3, and Australian Constitutions Act, 1842 (5 & 6 Vict. c. 76), s. 32.

(*y*) Victoria Constitution Act, 1855 (18 & 19 Vict. c. 55), s. 3; and Australian Constitutions Act, 1842 (5 & 6 Vict. c. 76), s. 32.

(*z*) Queensland Constitution Order in Council, June 6, 1859, s. 14.

(*a*) Western Australia Constitution Act, 1890 (53 & 54 Vict. c. 26), s. 2 (a).

(*b*) New Zealand Constitution Act, 1852 (15 & 16 Vict. c. 72), s. 58.

(*c*) S. 83 of Ordinance of 1852 scheduled to Order in Council, March 11, 1853.

(*d*) Natal Constitution Act (No. 14 of 1893), s. 7.

(*e*) Transvaal Constitution Letters Patent, December 6, 1906, s. xli.

(*f*) Orange River Colony Letters Patent, June 5, 1907, s. xliii. Now Orange Free State; see p. 513, *ante*.

(*g*) South Africa Act, 1909 (9 Edw. 7, c. 9), s. 65.

(*h*) Colonial Regulations, chap. 1, s. 3, rr. 19, 20, 21.

His Majesty's pleasure with regard to a law is signified through a Secretary of State, or, when the constitution of a colony so prescribes, by Order in Council.

Reservation for signification of His Majesty's pleasure.

**925.** In some cases the Governor is empowered to reserve laws for the signification of His Majesty's pleasure, instead of himself assenting or refusing his assent to them. Laws are usually reserved which concern divorce, currency, treaty relations, differential duties, control of the troops or the navy; also laws of an unusual purport affecting the prerogative or the right and property of British subjects not resident in the colony, or the trade and shipping of the United Kingdom; and laws differentiating between persons of European birth or descent and persons not so. This last subject, however, is not a matter for reservation in the legislation of the Cape of Good Hope. In the Commonwealth of Australia laws must be reserved which limit the Royal prerogative to grant special leave to appeal to the Sovereign in Council from decisions of the High Court (*i*). Such laws, being incomplete enactments, have no force until confirmed by His Majesty. In certain cases such laws become null and void, unless His Majesty's confirmation of them has been signified in the colony before the lapse of a certain time (*j*). That time is, in the Dominion of Canada, two years from the presentation of the law to the Governor-General for his assent (*k*); in the Provinces of Canada, one year from presentation to the Lieutenant-Governor (*l*); in the Commonwealth of Australia (*m*) and the sx States constituting the Commonwealth (*n*), and in New Zealand (*o*), Cape Colony (*p*), the Transvaal (*q*), and the Orange River Colony (*r*), two years from presentation to the Governor-General or Governor; in the Union of South Africa and in the provinces thereof, one year from presentation to the Governor-General (*s*).

**926.** Every Bill passed by the legislature of any State forming part of the Commonwealth of Australia must be reserved for the signification of His Majesty's pleasure thereon which alters the constitution of the State legislatures or of either House thereof, or affects the salary of the Governor of the State, or is required to be reserved under any Act of the State legislature subsequent to this Act, or under any provision of the Bill itself (*t*).

(*i*) See Keith on Responsible Government in the Dominions, 52, 178, 180, 214.
(*j*) Colonial Regulations, chap. 1, s. 3, rr. 19, 21.
(*k*) British North America Act, 1867 (30 & 31 Vict. c. 3), s. 57.
(*l*) *Ibid.*, s. 90.
(*m*) Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12), schedule, art. 60.
(*n*) Australian States Constitution Act, 1907 (7 Edw. 7, c. 7), s. 1 (3), and Australian Constitutions Act, 1842 (5 & 6 Vict. c. 76), s. 33.
(*o*) New Zealand Constitution Act, 1852 (15 & 16 Vict. c. 72), s. 59; and Australian Constitutions Act, 1842 (5 & 6 Vict. c. 76), s. 33.
(*p*) Ordinance of the colony of 1852 scheduled to Order in Council of March 11, 1853, s. 84.
(*q*) Transvaal Constitution Letters Patent, December 6, 1900, s. xlii.
(*r*) Orange River Colony Constitution Letters Patent, June 5, 1907, s. xliv. Now Orange Free State, see p. 513, *ante*.
(*s*) South Africa Act, 1909 (9 Edw. 7, c. 9), ss. 66, 90.
(*t*) Australian States Constitution Act, 1907 (7 Edw. 7, c. 7), s. 1 (1), (3). Compare provision in South Africa Act, 1909 (9 Edw. 7, c. 9), s. 64.

SECT. 2. The Legislature.

Colonial Constitution Acts have usually been reserved for the signification of His Majesty's pleasure.

Proof of acts of state.

**927.** All acts of state of any British colony are provable in courts of justice, or before persons authorised to receive evidence, by examined copies, or by authenticated copies, sealed with the seal of the colony to which the original document belongs, proof of the seal being unnecessary (*u*). Copies of colonial laws or of Bills reserved for the signification of His Majesty's pleasure, certified by the clerk or other proper officer of any colonial legislature, are *primâ facie* evidence of the laws having been passed, or the Bills passed and presented to the Governor; and any proclamation purporting to be published by authority of the Governor in any newspaper of a colony signifying His Majesty's disallowance of a law of the colony, or His Majesty's assent to a reserved Bill, is *primâ facie* evidence of such disallowance or assent (*v*).

**928.** Copies of all Acts, ordinances, and statutes passed by the legislature of any British possession, and of orders, regulations, and other instruments issued or made under the authority of any such legislature, if purporting to be printed by the Government printer, are to be received in evidence by all courts of justice in the United Kingdom, without proof that they were so printed (*a*).

Distribution of legislative powers in Canada between—

**929.** In Canada the legislative powers are carefully distributed between the Dominion Parliament and the provincial legislatures, the authority of the former extending to all classes of subjects not exclusively assigned to the latter, and particularly and exclusively to the following classes (*b*), namely :—

(1) The Dominion;

(1) The public debt and property; (2) Regulation of trade and commerce; (3) Taxation; (4) Borrowing money on the public credit; (5) Postal services; (6) Census and statistics; (7) Militia, military and naval services, defence; (8) Salaries and allowances of civil and other officers of the Government of Canada; (9) Beacons, buoys, lighthouses, and Sable Island; (10) Navigation and shipping; (11) Quarantine and marine hospitals; (12) Sea-coast and inland fisheries; (13) Ferries between a Province and any British or foreign territory, or between two Provinces; (14) Currency and coinage; (15) Banking, incorporation of banks, and issue of paper money; (16) Savings banks; (17) Weights and measures; (18) Bills of exchange and promissory notes; (19) Interest; (20) Legal tender; (21) Bankruptcy and insolvency; (22) Patents of invention and discovery; (23) Copyrights; (24) Indians and land reserved for Indians; (25) Naturalisation and aliens; (26) Marriage and divorce; (27) The criminal law,

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(*u*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 7.

(*v*) Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 6.

(*a*) Evidence (Colonial Statutes) Act, 1907 (7 Edw. 7, c. 16), s. 1 (1). "British possession" means any part of His Majesty's dominions, except the United Kingdom, inclusive both of parts under a central legislation and each part under a local legislation (*ibid.*, s. 1 (3)). The Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), is not affected (*ibid.*, s. 1 (4)).

(*b*) British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91.

except the constitution of courts of criminal jurisdiction, but including criminal procedure; (28) Establishment, maintenance, and management of penitentiaries; (29) Classes of subjects expressly excepted in the enumeration of classes assigned exclusively to the provincial legislatures.

(2) The Provinces.

**930.** The legislature of each province has exclusive jurisdiction over the following classes of subjects (*c*):

(1) The amendment of the provincial constitution, except as regards the office of Lieutenant-Governor; (2) Direct taxation within the province to raise revenue for provincial purposes; (3) Borrowing money on sole credit of the province; (4) Establishment and tenure of provincial offices, and the appointment and payment of provincial officers; (5) Management and sale of public lands of the province and of the timber and wood thereon; (6) Establishment, maintenance, and management of public reformatory prisons in, and for, the province; (7) Establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in, and for, the province, other than marine hospitals; (8) Municipal institutions in the province; (9) Shop, saloon, tavern, auctioneer, and other licences for raising revenue for provincial, joint, or municipal purposes; (10) Local works and undertakings other than such as are of the following classes: (a) lines of steam and other ships, railways, canals, telegraphs, and other works and undertakings, connecting the province with any other of the provinces, or extending beyond the limits of the province: (b) steamer lines between the province and any British or foreign country: (c) such works as, although wholly within the province, are, before or after their execution, declared by the Parliament of Canada to be for the advantage of Canada in general, or of two or more provinces; (11) Incorporation of companies with provincial objects; (12) Solemnisation of marriages in the province; (13) Property and civil rights in the province; (14) Administration of justice in the province, including the constitution, maintenance, and organisation of provincial courts of civil and criminal jurisdiction, including civil procedure; (15) Punishment by fine, penalty, or imprisonment, for enforcing any provincial law, concerning any matter coming within any of the classes of subjects enumerated above; (16) Generally all matters of a merely local or private nature in the province.

The legislature in each province may also exclusively make laws for education, with protection for denominational schools, the dissentient Protestant and Roman Catholic schools in Quebec, and the rights and privileges of Protestant or Roman Catholic minorities in relation to education (*d*).

Principles on which construed.

These arrangements for distributing the legislative powers between the Dominion and the Provinces must be read together, and the language of one section interpreted, and, when necessary, modified by that of the other (*e*).

(*c*) British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92.
(*d*) *Ibid.*, s. 93.
(*e*) *Citizens Insurance Co. of Canada* v. *Parsons*; *Queen Insurance Co.* v. *Same*

SECT. 2. The Legislature.

Power to legislate.

**931.** In so far as regards matters specially reserved for provincial legislation, the provincial legislatures are free from the control of the Dominion, and supreme within their respective limits. The constitutions of all the provinces are upon the same level (*f*). But the provision (*g*) that, "notwithstanding anything in this Act," the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes plainly indicates that the legislation of that Parliament, so long as it strictly relates to those matters, is to be of paramount authority, even though trenching upon matters assigned (*h*) to a provincial legislature (*i*). The power to legislate conferred may be fully exercised, although with the effect of modifying civil rights in the province (*j*). And where a given field of legislation is within the competence both of the Parliament of Canada and of a provincial legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province, if they are in conflict (*k*). But the Dominion Parliament has no authority to repeal any provincial statute directly, whether it does or does not come within the limits of the jurisdiction prescribed (*l*).

Repealing of statutes.

**932.** The repeal of a provincial Act by the Parliament of Canada can only be effected when there exists repugnancy between its provisions and the enactments of the Dominion; and if the existence of such repugnancy should be a matter of dispute, the controversy cannot be settled by the action of the Dominion legislature or of the provincial legislature, but must be submitted to the judicial tribunals. Neither the Parliament of Canada nor the provincial legislatures have any authority to repeal statutes which they could not directly enact (*l*).

Limitation of Dominion legislative power.

**933.** In legislating with regard to matters not specified among the enumerated subjects of legislation, but upon which the Parliament of Canada has the power to legislate, because they concern the peace, order, and good government of the Dominion (*m*), the Dominion Parliament has no authority to encroach upon any class of subjects exclusively assigned to the provincial legislatures (*l*). Such exercise of legislative power by the Dominion Parliament ought to be strictly confined to matters which are unquestionably of Canadian interest and importance (*n*). But some matters, in their origin local and provincial, might attain to such dimensions

(1881), 7 App. Cas. 96, 109, P. C., approved in *Russell* v. *R.* (1882), 7 App. Cas. 829, 839, P. C.

(*f*) *Maritime Bank of Canada (Liquidators)* v. *New Brunswick (Receiver-General)*, [1892] A. C. 437, 442, P. C.

(*g*) British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91.

(*h*) *Ibid.*, s. 92.

(*i*) *Tennant* v. *Union Bank of Canada*, [1894] A. C. 31, 45, P. C.; *Grand Trunk Rail.* v. *A.-G. of Canada*, [1907] A. C. 65, 68, P. C.; *Toronto Corporation* v. *Canadian Pacific Rail.*, [1908] A. C. 54, P. C.

(*j*) *Tennant* v. *Union Bank of Canada*, *supra*, at p. 47.

(*k*) *La Compagnie Hydraulique de St. Francois* v. *Continental Heat and Light Co.*, [1909] A. C. 194, 198, P. C.

(*l*) *A.-G. for Ontario* v. *A.-G. for the Dominion*, [1896] A. C. 348, 366, P. C.

(*m*) British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91.

(*n*) *A.-G. for Ontario* v. *A.-G. for the Dominion*, *supra*, at p. 360.

as to affect the body politic of the Dominion, and so justify the Canadian Parliament in passing laws for their regulation or abolition, in the interest of the Dominion as a whole (*o*).

Local or private legislation.

**934.** The provision (*p*) that any matter, coming within the classes of subjects enumerated, shall not be deemed to come within the classes of matters assigned exclusively (*q*) to the provincial legislatures, only enables the Parliament of Canada to deal with local or private matters in cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it with regard to the enumerated heads (*r*).

Liquor traffic.

Subjects which in one aspect and for one purpose fall within one section may in another aspect and for another purpose fall within the other section (*s*), *e.g.*, the traffic in intoxicating liquors, which may be dealt with as one of general concern to the Dominion and one upon which uniformity of legislation is desirable, and therefore within the scope of the Dominion Parliament (*t*), or as matter "of a merely local nature in the province" (*a*).

Naturalisation.

**935.** So, too, naturalisation is made a subject of the exclusive jurisdiction of the Dominion Parliament, *i.e.*, for the determination of what shall constitute naturalisation (*b*); but the question as to what privileges shall be attached to it, as distinguished from the rights and obligations necessarily involved therein, is matter within the powers of provincial legislation (*c*).

Special powers of legislatures of Ontario and Quebec.

**936.** The powers conferred (*d*) on the provincial legislatures of Ontario and Quebec to repeal and alter the old statutes of the old Parliament of Canada are made precisely co-extensive with the power of direct legislation (*e*), with which these bodies are invested (*f*).

Judicial decisions on—

(1) Legislative powers of Dominion;

**937.** The following subjects have been held to be within the exclusive powers of the Dominion to legislate upon:—

(1) Provision for the mode of determining election petitions in the case of controverted elections to the Canadian Parliament, by trial before the courts of ordinary jurisdiction in the provinces (*g*);

(2) Making the judgment of the Court of Appeal (Canadian) in matters of insolvency final (*h*);

(3) Transfer of a railway vested in the Dominion (*i*);

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(*o*) *A.-G. for Ontario* v. *A.-G. for the Dominion*, [1896] A. C. 348, P. C., at p. 364.
(*p*) British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91 *et seq.*
(*q*) *Ibid.*, s. 92.
(*r*) *A.-G. for Ontario* v. *A.-G. for the Dominion*, *supra*, at p. 360.
(*s*) *Hodge* v. *R.* (1883), 9 App. Cas. 117, 130, P. C.
(*t*) *Russell* v. *R.* (1882), 7 App. Cas. 829, 841, P. C.
(*a*) *A.-G. of Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A. C. 73, P. C.
(*b*) British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91 (25).
(*c*) *Cunningham* v. *Tomey Homma*, [1903] A. C. 151, P. C.
(*d*) British North America Act, 1867 (30 & 31 Vict. c. 3), s. 129.
(*e*) *Ibid.*, s. 92.
(*f*) *Dobie* v. *Temporalities Board* (1882), 7 App. Cas. 136, 147, P. C.
(*g*) *Valin* v. *Langlois* (1879), 5 App. Cas. 115, P. C.
(*h*) *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409, P. C.
(*i*) *Western Counties Rail. Co.* v. *Windsor and Annapolis Rail. Co.* (1882), 7 App. Cas. 178, P. C.

SECT. 2. The Legislature.

(4) Prohibition, with exceptions, throughout the Dominion of the sale of intoxicating liquors, regulation of the traffic in the excepted cases, with provision for special application to particular places, and making violations of the law criminal offences (*k*);

(5) Incorporation of a company to carry on various definite kinds of business throughout the Dominion, though it may confine its operations to one province (*l*);

(6) Regulations for construction, repair, and alteration of the Canadian Pacific Railway and the constitution and powers of the company (*m*);

(7) Prevention of the profanation of the Lord's Day (*n*);

(8) Incorporation of a telephone company to carry on business involving extension beyond the limits of one province (*o*);

(9) Grant to a trans-continental railway connecting several provinces of the right to deal with a provincial foreshore, including the right to obstruct any previously existing rights of passage (*p*).

But the fact that legislative jurisdiction is conferred on the Dominion legislature in respect to a particular subject-matter does not of itself prove that any proprietary rights with respect to it are transferred to the Dominion (*q*).

(2) Scope of provincial legislatures.

**938.** The following subjects have been held to be within the scope of provincial legislatures:—

(1) Relief of a benefit and benevolent society from a state of financial embarrassment, with a view to its continuing its operations (*r*);

(2) Issue of debentures, on the credit of a parish in the province, for raising by local taxation a subsidy to promote the construction of a railway, already authorised by statute, extending beyond the province (*s*);

(3) Regulation of contracts of the business of fire insurance in a single province (*t*);

(4) Regulations in the nature of police, or municipal regulations of a merely local character, for the good government of taverns etc. licensed for the sale of liquors by retail (*a*);

(5) Direct taxation of commercial corporations, carrying on business within the legislating province, *e.g.*, banks, whether or not

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(*k*) *Russell* v. *R.* (1882), 7 App. Cas. 829, P. C.

(*l*) *Colonial Building and Investment Association* v. *A.-G. of Quebec* (1883), 9 App. Cas. 157, P. C.

(*m*) *Canadian Pacific Rail.* v. *Parish of Notre Dame de Bonsecours Corporation*, [1899] A. C. 367, 372, P. C.

(*n*) *A.-G. for Ontario* v. *Hamilton Street Rail.*, [1903] A. C. 524, P. C.

(*o*) *Toronto Corporation* v. *Bell Telephone Co. of Canada*, [1905] A. C. 52, P. C.

(*p*) *A.-G. for British Columbia* v. *Canadian Pacific Rail.*, [1906] A. C. 204, P. C.

(*q*) *A.-G. for Dominion of Canada* v. *AA.-G. for the Provinces of Ontario, Quebec, and Nova Scotia*, [1898] A. C. 700, 709, P. C.

(*r*) *L'Union St. Jacques de Montreal* v. *Bélisle* (1874), L. R. 6 P. C. 31.

(*s*) *Dow* v. *Black* (1875), L. R. 6 P. C. 272.

(*t*) *Citizens Insurance Co. of Canada* v. *Parsons* (1881), 7 App. Cas. 96, P. C.

(*a*) *Hodge* v. *R.* (1883), 9 App. Cas. 117, P. C.

their principal place of business is in the province, insurance companies, brewers and distillers (*b*);

(6) Letters patent for appointments of King's Counsel, and grants of precedence to the provincial Bar (*c*);

(7) Local legislation as to the liquor traffic (*d*);

(8) Voluntary assignments of insolvent persons, where legislation with respect thereto is merely ancillary to the bankruptcy law, and does not interfere with Dominion bankruptcy statutes (*e*);

(9) Grant of exclusive right to establish a system of electric lighting for a term of years in a city of the province (*f*);

(10) Imposition upon the Canadian Pacific Railway Company of the duty thoroughly to cleanse their ditches when so choked with silt or rubbish as to cause an overflow and injury to other property in a parish within the province (*g*).

But the imposition of a stamp duty on policies of insurance, renewals, and receipts is not within the power of a provincial legislature (*h*), nor is the imposition of a duty on exhibits filed in court in any action (*i*). A provincial legislature cannot set limits to the exercise by the Supreme Court of Canada of its appellate jurisdiction (*j*), nor tax property locally situate outside the province (*k*).

**939.** In Australia the method of defining the respective powers of the legislatures of the Commonwealth and of the States differs from that adopted in Canada. The Parliament of the Commonwealth of Australia has exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to only three classes of subjects:—

Distribution of powers in Australia as between—

(1) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes; (2) Matters relating to any department of the public service, the control of which is, by the constitution, transferred to the executive Government of the Commonwealth; (3) Other matters declared by the constitution to be within the exclusive power of the Parliament (*l*).

(1) The Commonwealth;

**940.** The Commonwealth Parliament also has power (*m*) to make laws with respect to—

Powers of Commonwealth Parliament.

(1) Trade and commerce with other countries and among the

(*b*) *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, P. C.; *Brewers and Maltsters' Association of Ontario* v. *A.-G. for Ontario*, [1897] A. C. 231, P. C.

(*c*) *A.-G. for the Dominion of Canada* v. *A.-G. for Province of Ontario*, [1898] A. C. 247, P. C.

(*d*) *A.-G. of Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A. C. 73, P. C.

(*e*) *A.-G. of Ontario* v. *A.-G. for Dominion of Canada*, [1894] A. C. 189, P. C.

(*f*) *Hull Electric Co.* v. *Ottawa Electric Co.*, [1902] A. C. 237, P. C.

(*g*) *Canadian Pacific Rail.* v. *Parish of Notre Dame de Bonsecours Corporation*, [1899] A. C. 367, P. C.

(*h*) *A.-G. for Quebec* v. *Queen Insurance Co.* (1878), 3 App. Cas. 1090, P. C.

(*i*) *A.-G. for Quebec* v. *Reed* (1884), 10 App. Cas. 141, P. C.

(*j*) *Crown Grain Co., Ltd.* v. *Day*, [1908] A. C. 504, P. C.

(*k*) *Woodruff* v. *A.-G. for Ontario*, [1908] A. C. 508, P. C.

(*l*) Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12). schedule, art. 52.

(*m*) *Ibid.*, arts. 51, 98.

SECT. 2. The Legislature.

Powers of Commonwealth Parliament.

States included in the Commonwealth, including navigation and shipping and State railways (*n*); (2) Taxation, but so as not to discriminate between States or parts of States (*o*); (3) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth; (4) Borrowing money on the public credit of the Commonwealth; (5) Postal, telegraphic, telephonic, and other like services; (6) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth; (7) Lighthouses, lightships, beacons, and buoys; (8) Astronomical and meteorological observations; (9) Quarantine; (10) Fisheries in Australian waters beyond territorial limits; (11) Census and statistics; (12) Currency, coinage, and legal tender; (13) Banking other than State banking, also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money; (14) Insurance other than State insurance, also State insurance extending beyond the limits of the State concerned; (15) Weights and measures; (16) Bills of exchange and promissory notes; (17) Bankruptcy and insolvency; (18) Copyrights, patents of inventions and designs, and trade marks; (19) Naturalisation and aliens; (20) Foreign corporations and trading or financial corporations formed within the limits of the Commonwealth; (21) Marriage; (22) Divorce and matrimonial causes, and in relation thereto parental rights and the custody and guardianship of infants; (23) Invalid and old age pensions; (24) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States; (25) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States; (26) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws; (27) Immigration and emigration; (28) The influx of criminals; (29) External affairs; (30) The relations of the Commonwealth with the islands of the Pacific; (31) The acquisition of property, on just terms, from any State or person for any purpose in respect of which the Parliament has power to make laws; (32) The control of railways with respect to transport for the naval and military purposes of the Commonwealth; (33) The acquisition, with the consent of a State, of any railways of the State, on terms arranged between the Commonwealth and the State; (34) Railway construction and extension in any State with the consent of that State; (35) Conciliation and arbitration for the prevention and settlement of industrial disputes, extending beyond the limits of any one State; (36) Matters in respect of which the constitution makes provision until the Parliament otherwise provides; (37) Matters referred to the Parliament of the Commonwealth by the parliament or parliaments of any State or States, but so that the law shall extend only to States by whose parliament the matter is referred, or which afterwards

(*n*) *Peninsular and Oriental Steam Navigation Co.* v. *Kingston*, [1903] A. C. 471, P. C.

(*o*) *Colonial Sugar Refining Co., Ltd.* v. *Irving*, [1906] A. C. 360, P. C.

adopt the law; (38) The exercise within the Commonwealth, at the request or with the concurrence of the parliaments of all the States directly concerned, of any power which could at the establishment of the constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia (*p*); (39) Matters incidental to the execution of any power vested by the constitution in the Parliament or in either House thereof, or in the government of the Commonwealth, or in the federal judicature, or in any department or officer of the Commonwealth.

(2) The States.

**941.** Power to legislate on these subjects is not, however, withdrawn from the State legislatures; and every power of a State parliament, not exclusively vested in the Commonwealth Parliament, or withdrawn from the State parliament, continues as at the establishment of the Commonwealth, or the admission of the State (*q*). But if a State law and a Commonwealth law should clash with one another, the Commonwealth law is to prevail (*r*).

In a case in which the Commonwealth exacted a penalty (*s*) for breaking customs seals lawfully imposed on goods on board ship, although the breaking took place whilst the ship was outside the jurisdiction, it was held that the exaction of the penalty was not *ultra vires*, the offence being completed by entering a port within the jurisdiction (*t*).

The right of the Governments of the Australian States to import goods is subject to the customs laws of the Commonwealth; a customs duty on goods so imported is not a tax on property belonging to the State which the Commonwealth is forbidden by the constitution to impose (*a*).

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(*p*) Created by the Federal Council of Australasia Act, 1885 (48 & 49 Vict. c. 60), repealed by the Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12), s. 7. The former Act, by s. 15, gave the Federal Council legislative authority in respect to the relations of Australasia with the islands of the Pacific, prevention of the influx of criminals, fisheries in Australasian waters beyond territorial limits, service of civil process, and enforcement of criminal process beyond the jurisdiction, extradition of offenders, enforcement of judgments of courts of law beyond the limits of the respective colonies, custody of offenders on board ships of colonial Governments beyond territorial limits, any matter referred to it by Order in Council at the request of the colonial legislatures, and, lastly, such of the following matters as might be referred to it by the legislatures of any two or more colonies, namely, the general defences, quarantine, patents of invention and discovery, copyright, bills of exchange and promissory notes, uniformity of weights and measures, recognition in the other colonies of marriage and divorce taking place in any one colony, naturalisation of aliens, status in the other colonies of corporations and joint-stock banks constituted in any one colony, any other matter of general Australasian interest with respect to which the several colonies can legislate within their own limits, but as to which a law of general application is desirable, but so that the Acts consequently passed by the council should only affect the colonies requesting or afterwards adopting the legislation.

(*q*) Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12), schedule, art. 107.

(*r*) *Ibid.*, art. 109.

(*s*) Under the Australian Customs Act, 1901 (No. 6 of 1901), s. 192.

(*t*) *Peninsular and Oriental Steam Navigation Co.* v. *Kingston*, [1903] A. C. 471, P. C.

(*a*) *A.-G. for New South Wales* v. *Collector of Customs for New South Wales*,

SECT. 2. The Legislature.

The rule that goods which have already paid customs or excise duties in the Commonwealth shall not be called upon to pay over again is a general one applicable to all States alike, and is necessary in passing from the old order to the new. The fact that it operates unequally in the several States arises, not from anything done by the Parliament of the Commonwealth, but from the inequality of the duties imposed by the States themselves (*b*).

Union of South Africa: powers of (1) Parliament;

**942.** In the Union of South Africa the Parliament has full power to make laws for the peace and good government of the Union (*c*). But money bills originate only in the House of Assembly, and may not be amended by the Senate (*d*). Provision is made for resolving disagreements between the two Houses by a joint sitting of their members, which in the case of a money bill may be convened during the session in which the Senate first rejects or fails to pass it (*e*). Two copies of each law are, on the King's assent being given, to be enrolled, one in English and one in Dutch, one of which is to be signed by the Governor-General; and in case of conflict between the two copies, that signed by the Governor is to prevail (*f*).

(2) Provincial councils.

The provincial councils may make ordinances not repugnant to any Act of Parliament in relation to matters coming within the following classes of objects:—(1) Direct taxation within the province for provincial revenue purposes; (2) Borrowing money on the credit of the province; (3) Education; (4) Agriculture; (5) Hospitals and charitable institutions; (6) Municipal institutions, divisional councils, and other similar local institutions; (7) Local works and undertakings within the province, except railways and harbours and other works extending beyond the province; subject to the power of Parliament to declare any work a national work and to provide for its construction; (8) Roads, outspans, ponts and bridges, except bridges connecting two provinces; (9) Markets and pounds; (10) Fish and game preservation; (11) Fines, penalties, or imprisonment for enforcing provincial laws relating to any of the above enumerated classes of subjects; (12) All matters in the opinion of the Governor-General in Council of a merely local and private nature; (13) All other subjects on which Parliament shall by law delegate the power of legislation to the council (*g*). A provincial council may recommend to Parliament the passing of any law on any matter as to which it is incompetent to legislate (*h*). Provincial revenue funds may be formed (*i*).

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[1909] A. C. 345, P. C. See Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12), schedule, arts. 86, 90, 114.

(*b*) *Colonial Sugar Refining Co., Ltd.* v. *Irving*, [1906] A. C. 360, P. C.

(*c*) South Africa Act, 1909 (9 Edw. 7, c. 9), s. 59.

(*d*) *Ibid.*, s. 60; and see ss. 61, 62.

(*e*) *Ibid.*, s. 63.

(*f*) *Ibid.*, s. 67. The same rule applies to ordinances of provincial councils, s. 91).

(*g*) *Ibid.*, ss. 85, 86.

(*h*) *Ibid.*, s. 87.

(*i*) *Ibid.*, s. 89.

## SECT. 3.—*The Judicial Power.*



### SUB-SECT. 1.—*Constitution of Colonial Courts.*

Modes of creation of Colonial courts.

**943.** Courts of justice in the colonies have been created in two ways: first, by the Crown acting by virtue of its prerogative, as in charters of government or in pursuance of powers granted by statute (*k*); secondly, by the Governments of colonies which have received representative institutions, and the legislatures of which are empowered by Imperial statute to establish and alter the constitution of courts of judicature and to make provision for the administration of justice (*l*).

Types of colonial judicature.

**944.** The usual type of judicature in a colony is a Supreme Court, with a Chief Justice and one or more puisne judges, with courts of inferior jurisdiction presided over by officers variously styled county court judges, police magistrates, sessions judges, district judges, circuit judges, recorders, justices of the peace etc. The Chief Justice is sometimes also judge of the Vice-Admiralty Court.

Dominion of Canada.

**945.** In the Dominion of Canada there is a Supreme Court of Canada, which is a court of appeal from all the provincial courts, presided over by the Chief Justice of Canada, with five puisne judges; there is also a Court of Exchequer of Canada, with one judge, with exclusive jurisdiction in claims against the Crown, and concurrent jurisdiction in revenue cases, and cases at the instance of the Attorney-General impeaching patents, or instruments respecting land, or seeking relief against officers of the Crown, for acts or omissions in the course of their duty.

When a provincial legislature passes an Act agreeing that the Supreme Court and the Exchequer Court, or the Supreme Court alone, shall have jurisdiction in controversies (1) between the Dominion and a province; (2) between the province and any other agreeing province; (3) as to the validity of an Act of the Parliament of Canada; (4) as to the validity of a provincial Act, then the specified jurisdiction shall be exercised by the Supreme and Exchequer Courts. In (1) and (2) the jurisdiction may be exercised by the Exchequer Court with an appeal to the Supreme Court; in (3) and (4) the jurisdiction is vested in the Supreme Court alone. Ontario, Nova Scotia, and British Columbia have passed Acts accordingly (*m*).

Ontario.

**946.** In Ontario there is a Supreme Court of Judicature embracing (1) the Court of Appeal, of which the Chief Justice of Ontario is president, with five justices of appeal, and (2) the High Court of Justice, consisting of the King's Bench, Common Pleas and Exchequer Divisions, each with a Chief Justice and two puisne judges, and the Chancery Division, with a Chancellor and two puisne judges. A judge of the Exchequer Court of Canada also sits for the Toronto Admiralty district.

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(*k*) *E.g.*, the British Settlements Act, 1887 (50 & 51 Vict. c. 54).
(*l*) Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 5.
(*m*) Revised Statutes of Canada, 1886, c. 135, ss. 72—4. See Munro, Constitution of Canada, chap. 18, p. 219.

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**947.** In Quebec there is the King's Bench, with a Chief Justice and five puisne judges, and a Superior Court, with a Chief Justice and an assistant Chief Justice, and a Vice-Admiralty Court, with one judge.

Quebec.

Nova Scotia. New Brunswick. Prince Edward Island. British Columbia. Manitoba. Newfoundland.

**948.** In Nova Scotia there is a Supreme Court, with a Chief Justice, an equity judge, five assistant judges, and a judge of the Vice-Admiralty Court. In New Brunswick there is a Supreme Court, with a Chief Justice and five puisne judges, and a Vice-Admiralty Court, and a Court of Marriage and Divorce, with one judge each. In Prince Edward Island there is a Supreme Court, with a Chief Justice (who is also judge of the Vice-Admiralty Court) and two assistant judges, who are styled respectively Master of the Rolls and Vice-Chancellor. In British Columbia (*a*), Manitoba, and Newfoundland, there are Supreme Courts of the ordinary type.

Australia and New Zealand.

**949.** In the Commonwealth of Australia the High Court, consisting of a Chief Justice and four justices, has a limited original jurisdiction, but is the court of appeal from the Supreme Courts of all the States. There is also a Court of Conciliation and Arbitration, presided over by one of the High Court justices.

The States of the Commonwealth and the Dominion of New Zealand have each a Supreme Court, with a Chief Justice and a number of puisne judges, varying in the different colonies.

Cape Colony, Natal. Transvaal and Orange Free State.

**950.** In Cape Colony there are, besides a Supreme Court, with a Chief Justice and two puisne judges, an Eastern Districts Court and a High Court of Griqualand, each with a judge president and two puisne judges. In Natal, besides the Supreme Court, with a Chief Justice (who is also judge of the Vice-Admiralty Court) and three puisne judges, there is a Native High Court, with a judge president and two judges. In the Transvaal and the Orange Free State there are Supreme Courts of the ordinary type.

Union of South Africa.

**951.** In the Union of South Africa there is a Supreme Court with a Chief Justice, ordinary judges of appeal and judges of the several divisions of the court in the provinces (*b*). It comprises an Appellate Division and provincial divisions of the court in the provinces. The Appellate Division consists of the Chief Justice, two ordinary judges of appeal, and two additional judges of appeal drawn from any of the provincial or local divisions of the court, their duties in which they continue to perform when not attending in the Appellate Division (*c*). The several supreme courts of the Cape of Good Hope, Natal, and the Transvaal, and the High Court of the Orange Free State became, on the establishment of the Union, provincial divisions within their respective provinces of the Supreme Court; they are presided over by a judge-president. Local divisions of the Supreme Court occupy the areas of the jurisdictions of the former court of the eastern districts of the Cape of Good Hope, of the former High Courts of Griqualand and

(*a*) The Supreme Court of British Columbia has divorce jurisdiction as to persons domiciled in the colony (*Watts* v. *Watts*, [1908] A. C. 573, P. C.).

(*b*) South Africa Act, 1909 (9 Edw. 7, c. 9), s. 95.

(*c*) *Ibid.*, ss. 96, 97.

Witwatersrand and of the former circuit courts. These provincial and local divisions of the court are styled superior courts, and, in addition to the original jurisdiction of the corresponding colonial courts, have jurisdiction in all matters in which (1) the Government of the Union or a person suing or being sued on its behalf is a party; (2) in which the validity of any provincial ordinance shall come into question. They also have *mutatis mutandis* the same jurisdiction as to the validity of elections of the members of the House of Assembly and provincial councils as the corresponding colonial courts had in regard to parliamentary elections (*d*). They are also courts of appeal from inferior courts (*e*). The Appellate Division is the court of appeal in all civil cases where an appeal lay before the establishment of the Union to the colonial Supreme Courts, except in certain cases of discretion and criminal cases, in which the appeal lies to the appropriate provincial divisions, without further appeal except to the Appellate Division by its leave (*f*).

West Indies.

**952.** In the West Indies there is a Windward Islands Court of Appeal, consisting of the Chief Justices of Barbados, Grenada, St. Lucia, and St. Vincent, any three of whom form a court to hear appeals from the fourth. Barbados has a Chief Justice, a Master in Chancery, and an assistant Court of Appeal, with three judges, and a Petty Debt Court, with one. The other three colonies have each a Supreme Court, with a Chief Justice, as also have the Bahamas and British Honduras. In Jamaica, Bermuda, the Leeward Islands, Trinidad and Tobago, and British Guiana there are Supreme Courts of the ordinary type. In Turk's and Caicos Islands there is a Supreme Court, with one judge.

West Africa, Gibraltar and Eastern Colonies.

**953.** There are also Supreme Courts of the ordinary type in the Gold Coast, Sierra Leone, Gambia, and Southern Nigeria, and in Gibraltar, Hong Kong, the Straits Settlements, Mauritius, and Ceylon, in which last-named colony there are also district judges. Seychelles has a judge.

Cyprus.

**954.** In Cyprus, besides a Supreme Court, with a Chief Justice and one puisne judge, there are six District Courts, each with a president and two judges, and four Cadis, the last-named being a memento of Turkish rights over the island.

Malta.

**955.** In Malta the Chief Justice is president of the Court of Appeal, to which two other judges are attached, the three being also judges of the Criminal Court. There is a Civil Court, divided into a First Hall, with two judges, and a Second Hall and Commercial Court, with one judge.

Pacific.

**956.** In the Pacific there is a Supreme Court in Fiji, the Chief Justice being also Judicial Commissioner for the Western Pacific.

Central Africa.

**957.** In the Nyasaland Protectorate there is a High Court, with one judge; in Uganda a High Court with two judges; in the British East Africa Protectorate a High Court presided over by

(*d*) South Africa Act, 1909 (9 Edw. 7, c. 9), s. 98.
(*e*) *Ibid.*, s. 105.
(*f*) *Ibid.*, s. 103.

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a principal judge, with two assistant judges; and in both Southern Rhodesia and North-eastern Rhodesia a High Court, in the former with two judges, in the latter with one judge. North-Western Rhodesia has a magistrate.

SUB-SECT. 2.—*Responsibilities of Colonial Judges.*

Tenure of office by colonial judge.

**958.** The great constitutional principle that judicial office is held on permanent tenure during good behaviour is practically extended to colonial judges (*g*). But judges may be removed from office by the Governor in Council of a colony for absence without reasonable cause, or neglect, or misbehaviour (*h*). Thus a judge who took advantage of the constitution of a court of which he was a member to obstruct recovery of his debts, and who was involved in bill transactions and pecuniarily embarrassed, was removed from office by the Governor in Council, and the removal upheld by the Privy Council, notwithstanding a slight irregularity not prejudicial to the judge (*i*).

Removal of judge.

**959.** Either House of the Imperial Parliament may, of course, entertain questions as to the appointment or conduct of colonial judges; and in colonies having Legislative Assemblies those assemblies have an undoubted constitutional right to address the Crown for the removal of a judge; and the Crown may refer to the Judicial Committee of the Privy Council for their consideration and advice any memorial from a colonial legislative body complaining of the conduct by a judge of his judicial duties (*k*). His Majesty, on the advice of a Secretary of State, can remove a judge holding office during His Majesty's pleasure if his conduct has been such that his continuance in office would be prejudicial to the administration of justice or to the public interest (*l*).

Responsibility for judicial acts.

**960.** No action lies against a judge of the Supreme Court of a colony for any act done in his judicial capacity, though oppressive and malicious, and to the injury of the plaintiff and the perversion of justice (*m*). But persons who had acted as judges of the Royal Court of St. Lucia under commissions irregularly issued by the Governor were held liable in an action for acts done in their assumed judicial capacity (*n*).

SUB-SECT. 3.—*Special Jurisdictions of Colonial Courts.*

Admiralty jurisdiction.

**961.** Any court of unlimited jurisdiction in a British possession may be declared by a law of the legislature of that possession to

(*g*) Todd, Parliamentary Government in the Colonies, 2nd ed., 828.

(*h*) Colonial Leave of Absence Act, 1782 (22 Geo. 3, c. 75); *Willis* v. *Gipps* (*Sir George*) (1846), 5 Moo. P. C. C. 379.

(*i*) *Montagu* v. *Van Diemen's Land* (*Lieutenant-Governor*) (1849), 6 Moo. P. C. C. 489.

(*k*) Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), s. 4.

(*l*) Report of Committee of the Privy Council, December 15, 1893, approved by Order in Council, March 3, 1894; and see Memorandum submitted to the Privy Council, 6 Moo. P. C. C. (N. S.), Appendix IX.

(*m*) *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668, C. A. But see *Houlden* v. *Smith* (1850), 14 Q. B. 841, and *Calder* v. *Halket* (1840), 3 Moo. P. C. C. 28, as to the liability of a judge who acts without jurisdiction.

(*n*) *Gahan* v. *Lafitte* (1842), 3 Moo. P. C. C. 382.

be a colonial Court of Admiralty, with the same jurisdiction, in manner and extent, as the High Court in England; and any inferior court of a British possession may, by the same authority, have partial or limited jurisdiction conferred on it (*o*). Upon such declaration being made, every Vice-Admiralty Court then existing in that possession is abolished (*p*). His Majesty may empower the Admiralty to establish in any British possession a Vice-Admiralty Court or courts to exercise jurisdiction as to prizes, His Majesty's navy, the slave trade, and questions arising under the Foreign Enlistment Act, 1870 (*q*), the Pacific Islanders Protection Acts, 1872 and 1875 (*r*), or as to treaties or conventions with foreign countries, or international law, and may appoint and dismiss the judges and other officers thereof (*s*).

Prize.

**962.** His Majesty or the Admiralty may at any time commission as a prize court in a British possession either a Vice-Admiralty Court or a colonial Court of Admiralty, or a Vice-Admiralty Court established *ad hoc*, but to act only on a proclamation being issued by the Vice-Admiral that war has broken out between His Majesty and a foreign state (*t*).

Admiralty offences, trial of.

**963.** Any person charged within a colony with an offence committed at sea, or within the Admiralty jurisdiction, is to be dealt with in the same way as if the offence had been committed on waters within the local jurisdiction of the colony (*a*). And if a person die in a colony of injuries received outside the colony, every offence in respect of the death is triable and punishable in the colony, as if wholly committed there; and if any person die at sea, or elsewhere in the Admiralty jurisdiction, of injuries received anywhere, any offence arising therefrom is to be deemed to have been wholly committed at sea (*b*). But the punishment is to be only such as is prescribed for such an offence by the law of the colony, or such as most nearly corresponds to the punishment applicable by the law of England (*c*).

Trial and punishment of extra-territorial offences.

**964.** A person charged with an offence before one of His Majesty's courts exercising jurisdiction in a foreign country may be sent for trial to any British possession named for that purpose in an Order in Council, and, if convicted, may be punished as if the offence had been committed in such British possession (*d*). Thus an accused person may be sent for trial from Siam to

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(*o*) Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), ss. 2, 3. But under the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), and the Slave Trade Act, 1873 (36 & 37 Vict. c. 88), the jurisdiction of a Vice-Admiralty Court is only to be exercised.

(*p*) Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), s. 17.

(*q*) 33 & 34 Vict. c. 90.

(*r*) 35 & 36 Vict. c. 19; 38 & 39 Vict. c. 51.

(*s*) Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), s. 9.

(*t*) Prize Courts Act, 1894 (57 & 58 Vict. c. 39), s. 2.

(*a*) Admiralty Offences (Colonial) Act, 1849 (12 & 13 Vict. c. 96), s. 1.

(*b*) *Ibid.*, s. 3.

(*c*) Courts (Colonial) Jurisdiction Act, 1874 (37 & 38 Vict. c. 27), s. 3.

(*d*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 6.

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Singapore; from China or Corea to Hong Kong; from Morocco to Gibraltar (*e*); from the Ottoman dominions to Malta; from Persia to Malta or Cyprus; from the Western Pacific to Fiji.

Execution in colonies of sentences of exterritorial courts.

**965.** The sentences passed by such British exterritorial courts may be carried into effect in such place as may be directed by Order in Council (*f*). Criminal British subjects may be deported from Siam to Singapore; from China or Corea to Hong Kong; from the Ottoman dominions or Persia to Malta or Gibraltar; from the Western Pacific to Fiji (*g*). The Supreme Courts of Gibraltar and Fiji are courts of appeal from the British exterritorial courts in Morocco, Siam, and His Majesty's Courts in the Western Pacific (*h*).

Trial and punishment in colonies of offences in vicinage.

**966.** Offences committed within twenty miles of the colonies of Sierra Leone, the Gambia, the Gold Coast, Lagos, and the adjacent protectorates, by British subjects, or by persons not subjects of any civilised Power against British subjects or residents within the colonies, may be tried and punished as if committed within the colonies (*i*); and His Majesty may establish courts in any British settlement not under any British legislature, and confer on any court in any British possession similar jurisdiction over matters occurring in any such British settlement (*k*).

Inquiries as to maritime casualties.

**967.** A colonial court, authorised thereto by the colonial legislature, has jurisdiction to conduct inquiries into shipwrecks and other shipping casualties, or into charges of incompetency or misconduct on the part of masters, mates, or engineers,—

(a) When a shipwreck or casualty happens to a British ship on or near the coast, or on a voyage to a port, of the British possession; (b) When a shipwreck or casualty occurs anywhere to a British ship registered in the British possession; (c) When some of the crew of the British ship concerned, who are witnesses to the facts, are in the British possession; (d) When the incompetency or misconduct has taken place on board a British ship registered in the British possession; (e) When the officer charged with incompetency or misconduct on board a British ship is in the British possession.

**968.** No such inquiry may be held into a matter already inquired into by any competent court of His Majesty, or where an officer's certificate has been cancelled or suspended by a naval court, or where an inquiry as to the same matter has been commenced in the United Kingdom. The Board of Trade may order a rehearing, or an appeal may be made to the High Court in England, except from any order or finding on an inquiry into a

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(*e*) *R.* v. *Spilsbury*, [1898] 2 Q. B. 615. In this case the change of *venue* to Gibraltar carried with it the right to a trial by jury (*Spilsbury* v. *R.*, [1899] A. C. 392, P. C.).

(*f*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 7.

(*g*) *Ibid.*, s. 8.

(*h*) *Ibid.*, ss. 9, 18.

(*i*) West Africa Offences Act, 1871 (34 & 35 Vict. c. 8), s. 1.

(*k*) British Settlements Act, 1887 (50 & 51 Vict. c. 54), ss. 2, 4.

casualty affecting a ship registered in a British possession, or from a decision as to a certificate not granted either in the United Kingdom or in a British possession, under the Merchant Shipping Act, 1894 (*l*).

Recognition of colonial probates etc.

**969.** Grants of probate or letters of administration by courts in British possessions, where similar grants (including Scotch confirmations) by courts of the United Kingdom are by law recognised, may be produced to any court of probate in the United Kingdom, and on a copy being therein deposited may be sealed, and thereupon they have the same effect in the United Kingdom as if granted by the court sealing them (*m*). Formerly the grantee of probate in a colony where the deceased was domiciled had to obtain a grant in England of administration *cum testamento annexo* (*n*). A limited colonial grant of administration *de bonis non* may be resealed in the United Kingdom on these conditions (*o*).

Jurisdiction in military matters.

**970.** Colonial courts have the same jurisdiction over summary offences and fines, and summary proceedings under the Army Act, as similar courts in England (*p*). A colonial court reports to the commanding officer in the colony the delivery of persons into military custody, and committals or remands on charges of desertion (*q*). A magistrate in a colony, or any other person duly authorised thereto by the Governor, has authority to attest soldiers (*r*).

Sending case for opinion.

**971.** A colonial court may send a case to any superior court in any other part of His Majesty's dominions for an opinion on questions therein submitted, which opinion may be given after hearing arguments from the parties concerned, and lodged in the court whence the case was sent, for application to the action pending; and it may be adopted or rejected on appeal (*s*).

Examination of witnesses on commission.

**972.** The Supreme Court in any colony may order the examination of any witnesses within its jurisdiction, under a commission or other

(*l*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 478.

(*m*) Colonial Probates Act, 1892 (55 Vict. c. 6), ss. 1, 2. The Act has been applied to the following colonies:—

| | | |
|---|---|---|
| The Gold Coast. | Bahamas. | Grenada. |
| Queensland. | Barbados. | St. Vincent. |
| New Zealand. | Lagos. | St. Helena. |
| Cape of Good Hope. | Tasmania. | Transvaal. |
| New South Wales. | Fiji. | Newfoundland. |
| Victoria. | Trinidad and Tobago. | Orange River Colony (now Orange Free State, see p. 513, *ante*); |
| Gibraltar. | Jamaica. | |
| British Honduras. | Natal. | and also (*ibid.*, s. 3) to one protectorate, namely, Southern Rhodesia. |
| Hong Kong. | Falkland Islands. | |
| Western Australia. | Leeward Islands. | |
| Ontario. | British Columbia. | |
| British Guiana. | Nova Scotia. | |
| South Australia. | Manitoba. | |
| Straits Settlements. | North-West territories, Canada. | |

(*n*) *In the Goods of Earl* (1867), L. R. 1 P. & D. 450.

(*o*) *In the Goods of Smith*, [1904] P. 114.

(*p*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 168.

(*q*) *Ibid.*, s. 154 (4), (7).

(*r*) *Ibid.*, s. 94.

(*s*) British Law Ascertainment Act, 1859 (22 & 23 Vict. c. 63), ss. 1—4.

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process from any competent tribunal in His Majesty's dominions, and may command the attendance of persons to be examined, the production of documents etc. (*t*). In civil proceedings such court may nominate a person to take the examination (*a*), and in criminal proceedings it may nominate a judge or magistrate to take it. The deposition so taken is admissible in evidence, as if taken before the court or judge to whom the process was addressed (*b*). Similar assistance may be given to foreign tribunals both in civil and commercial matters (*c*) and in criminal cases of a non-political character (*d*).

Appeal as to foreign jurisdiction.

**973.** On the application of a colonial court a Secretary of State must give a decision, to be final, as to the existence or extent of any jurisdiction of His Majesty in a foreign country (*e*).

Discharge in extradition proceedings.

**974.** A judge of any court in a British possession with like powers to those of the King's Bench Division in England, is authorised to discharge a criminal in custody on extradition proceedings, if he is not conveyed out of the possession within two months of his committal (*f*).

*Leges silent inter arma.*

**975.** The ordinary tribunals in a colony have no jurisdiction concerning acts done by the military authorities when actual war is raging; and a state of actual war may exist, although for some purposes some of the ordinary tribunals may be permitted to carry on their functions in a district under martial law (*g*).

*Habeas corpus.*

**976.** No writ of *habeas corpus* may issue from an English court to any colony, where there is a court which can issue the writ, and have it duly executed (*h*).

Actions on foreign judgments alleged to be for penalties.

**977.** When in an action in a colonial court on a foreign judgment the defence is that the judgment was for a penalty, and that therefore the action ought not to be entertained, according to the rule prohibiting the courts of one country executing the penal laws of another, or enforcing penalties in favour of a foreign State, it is the duty of the colonial court to decide for itself whether the statute in question is penal, within the rule, so as to oust its jurisdiction. The colonial court is not bound by the interpretation given to the statute by the foreign court, but is to construe and apply an international rule, which is a matter of law entirely within the cognisance of the court whose jurisdiction is invoked. The rule applies, not only to prosecutions and sentences for crimes and misdemeanours, but also to all suits in favour of the State for the

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(*t*) Evidence by Commission Act, 1859 (22 Vict. c. 20), ss. 1, 5; *Bullivant* v. *A.-G. for Victoria*, [1901] A. C. 196.
(*a*) Evidence by Commission Act, 1885 (48 & 49 Vict. c. 74), s. 2.
(*b*) *Ibid.*, s. 3.
(*c*) Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), ss. 1, 2, 6.
(*d*) Extradition Act, 1870 (33 & 34 Vict. c. 52), ss. 24, 25.
(*e*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 4. See *Hervey* v. *Fitzpatrick* (1854), Kay, 421, under a similar section in the repealed Act.
(*f*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 17 (4).
(*g*) *Ex parte D. F. Marais*, [1902] A. C. 109, P. C.
(*h*) Habeas Corpus Act, 1862 (25 & 26 Vict. c. 20), s. 1.

recovery of penalties for any violation of statutes for the protection of the revenue, or other municipal laws, and to all judgments for such penalties (*i*). On the same principle an action will not lie in England to recover a contribution, levied under a colonial statute, towards payment of expenses of a local or municipal nature (*k*).

Comity between English and colonial courts.

**978.** Every court in a British possession exercising bankruptcy jurisdiction is empowered to act in aid of every other and of all courts of similar jurisdiction in the United Kingdom (*l*).

A colonial court has jurisdiction to entertain a suit for the same matter as a suit is pending for in an English court (*m*), and an English court will not set aside the judicial sale of an estate in a colony directed by the judgment of a competent court in the colony (*n*). English courts will assume that colonial courts have full and ample powers to do complete justice until the contrary is shown (*o*) and their proceedings will be presumed to have been regular (*p*).

Contempt of court.

**979.** As courts of record the supreme or superior courts in the colonies have power to punish summarily, by fine or commitment, for contempt of court. But to constitute contempt of court an act must be calculated to obstruct, or interfere with, the course of justice or due administration of the law (*q*). Appeals against the exercise of the power to punish contempt of court will not be entertained by the Judicial Committee of the Privy Council, except in cases very special in their circumstances (*r*). The power to commit summarily for contempt of court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person, but only from a sense of duty, under the pressure of public necessity. No rule can, however, be laid down which is applicable to all cases. Committals for scandalising the court itself have become obsolete in England, the courts being satisfied to leave attacks upon them to public opinion. But in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of court, for attacks on the court, may be necessary to preserve, in such a community, the dignity of, and respect for, the court (*s*). But where in the opinion of the Judicial Committee there has been no contempt of court (*t*), or an inappropriate punishment has been awarded (*u*), or an order is made on grounds unsupported by evidence, or without notice to the

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(*i*) *Huntington* v. *Attrill*, [1893] A. C. 150, 155—157, P. C.
(*k*) *Sydney Municipal Council* v. *Bull*, [1909] 1 K. B. 7.
(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 118.
(*m*) *Bayley* v. *Edwards* (1792), 3 Swan. 703.
(*n*) *White* v. *Hall* (1806), 12 Ves. 321.
(*o*) *Smith* v. *Moffatt* (1865), L. R. 1 Eq. 397.
(*p*) *Robertson* v. *Struth* (1844), 5 Q. B. 941; *Henderson* v. *Henderson* (1844), 6 Q. B. 288, 298.
(*q*) *Re Special Reference from the Bahama Islands*, [1893] A. C. 138, P. C.
(*r*) See *McDermott* v. *British Guiana* (*Judges*) (1868), L. R. 2 P. C. 341.
(*s*) *McLeod* v. *St. Aubyn*, [1899] A. C. 549, P. C.
(*t*) *Ibid.*
(*u*) *Re Wallace* (1866) L. R. 1 P. C. 283.

SECT. 3. The Judicial Power.

person charged, or without giving time to prepare defence (*v*), an appeal will be allowed.

Extradition between United Kingdom and colonies.

**980.** A system of extradition between His Majesty's dominions in the United Kingdom and abroad has been created (*w*), by which fugitives from any one part of those dominions may be apprehended in another part, and sent back for trial to the part whence they fled, either by warrant issued in one part, and indorsed in another part, by one of the proper authorities (*x*), or by a provisional warrant, issued in any part which the fugitive is believed to be in, or on his way to, on the same conditions as if the offence charged had been committed within the jurisdiction, and the warrant backed and executed accordingly (*y*). On apprehension, the fugitive is brought before a magistrate, and dealt with as if the offence charged had been committed within the jurisdiction (*z*). If he is committed to prison, a certificate and report thereof is made to the Secretary of State if the matter occurs in the United Kingdom, or to the Governor, if it occurs in a British possession (*a*). Fifteen days after the making of such certificate and report or after the decision of the court, on any writ of *habeas corpus*, or similar process, issued by a superior court, the fugitive is sent by warrant to the part of His Majesty's dominions whence he fled (*b*). If he is not removed in a month, a superior court may, on proof of notice to the Secretary of State, or the Governor, order his discharge (*c*). If the fugitive is not prosecuted within six months of his return, or if he is acquitted, he may be sent back free of cost without delay to the place where, or on his way whither, he was apprehended (*d*), or he may be discharged absolutely or on bail, or his return ordered after a date stated etc. (*e*). Groups of British possessions have been formed by Order in Council, to which contiguity or other reasons make it expedient to apply the system of inter-colonial backing of warrants and other provisions of the Fugitive Offenders Act, 1881 (*f*).

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(*v*) *Re Pollard* (1868), L. R. 2 P. C. 106.

(*w*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69). And see title EXTRADITION AND FUGITIVE OFFENDERS.

(*x*) *Ibid.*, s. 3. The proper authority is in the United Kingdom a judge of a superior court, a Secretary of State, or a Bow Street magistrate, and in a British possession a Governor.

(*y*) *Ibid.*, s. 4.

(*z*) *Ibid.*, s. 5.

(*a*) *Ibid.*, s. 5.

(*b*) *Ibid.*, s. 6.

(*c*) *Ibid.*, s. 7.

(*d*) *Ibid.*, s. 8.

(*e*) *Ibid.*, s. 10.

(*f*) *Ibid.*, ss. 12 *et seq.*

The groups formed are as follows, namely:—

| | | |
|---|---|---|
| New South Wales. | Queensland. | Western Australia. |
| Victoria. | New Zealand. | Fiji. |
| South Australia. | Tasmania. | August 23, 1883. |
| Jamaica. | Leeward Islands. | St. Lucia. |
| Turk's and Caicos Islands. | Barbados. | Tobago. |
| British Guiana. | St. Vincent. | Bahamas. |
| Trinidad. | Grenada. | British Honduras. |

Only with respect to offences to which Part I. of the Act applies, November 29, 1884.

Conflict of jurisdiction.

**981.** Provision is made for the trial of offences committed on the borders of two British possessions, or on a journey between British possessions, for the place of trial for false evidence, for the kinds of punishment to be inflicted, for the mode of indorsement and execution of warrants, and for the conveyance of fugitives to prison etc. (*g*).

The offences to which the procedure applies are—treason, piracy, and every offence punishable, where committed, by twelve months' imprisonment with hard labour or more (*h*). Evidence must be produced before the magistrates of the commission by the fugitive of an offence punishable by the law of the colony (or place) where it is alleged to have been committed, by imprisonment with hard labour for at least twelve months (*i*).

Extradition to foreign countries.

**982.** If the legislature of any British possession provides by law for the surrender of fugitive criminals who are in, or suspected to be in, such possession, His Majesty may by Order in Council either suspend the operation, within such possession, of the Extradition Act, 1870, or part of it, or direct that the law, or any part of it, shall have effect within such British possession, with or without modifications or alterations, as if it was part of the Imperial Act (*k*).

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Straits Settlements, Hong Kong, Labuan, December 12, 1885.

His Majesty's East Indian territories, Ceylon, Straits Settlements, December 12, 1885.

| | | |
|---|---|---|
| Cape of Good Hope. | Transvaal. | British Central Africa Protectorate (now Nyasaland Protectorate). |
| Natal. | Bechuanaland protectorate. | |
| Basutoland. | Southern Rhodesia. | |
| Orange River Colony (now Orange Free State). | Barotseland—North-West Rhodesia. | North-Eastern Rhodesia. |
| | | Swaziland. |

August 8, 1901, and June 1, 1907, as if the last six were British possessions, to which also Part I. of the Act is applied. And see Order in Council October 22, 1906, as to Natal, made under Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 32.

| | |
|---|---|
| Gambia. | Gambia Protectorate. |
| Sierra Leone | Sierra Leone Protectorate. |
| Gold Coast. | Northern territories of the Gold Coast. |
| Ashanti. | Lagos Protectorate. |
| Lagos. | Northern and Southern Nigeria (Lagos, Lagos Protectorate, and Southern Nigeria now jointly constitute the colony and protectorate of Southern Nigeria). |

Part I. to apply to the last six places as if each was a British possession on June 11, 1902.

(*g*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), ss. 20 *et seq.*

(*h*) *Ibid.*, s. 9.

(*i*) *R.* v. *Brixton Prison* (*Governor*), *Ex parte Percival*, [1907] 1 K. B. 696. But see now Evidence (Colonial Statutes) Act, 1907 (7 Edw. 7, c. 16).

(*k*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 18. Orders in Council have been made suspending the operation of the Act in Canada, the most recent and that now in force being the Order of July 6, 1907. Orders have

SECT. 3. The Judicial Power.

Inter-colonial removal of prisoners.

**983.** Prisoners may be removed from any one colony to any other, for the purpose of serving their sentences, and returned on the expiry of their terms, by agreements entered into between the prescribed colonial authorities, and sanctioned by His Majesty in Council (*l*); and a principal Secretary of State may, with the concurrence of the Governments of the British possessions concerned, order a prisoner to be removed from any one British possession to any other, or to the United Kingdom, to serve out his term, for any of the following reasons:—

(1) That his life may be endangered, or his health permanently injured, by imprisonment where sentenced; (2) That he belonged to the Royal Navy or to His Majesty's regular army when the offence was committed; (3) That the offence was committed wholly, or partly, outside the first British possession; (4) That there is no proper prison in the first British possession for him to serve out his term in; (5) That he is a person who, by the law of the British possession, is subject to removal (*m*).

**984.** The legislature of a British possession may make laws for carrying these statutory powers into effect, so far as regards that

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been made directing the colonial law to have effect as if part of the Imperial Act in—

New Zealand, May 13, 1875.
Hong Kong, March 30, 1877.
Trinidad, July 11, 1877, November 20, 1894.
Gibraltar, July 11, 1877.
Mauritius, July 11, 1877.
Straits Settlements, July 11, 1877, December 31, 1883.
Bahamas, August 13, 1877.
Jamaica, Gold Coast } November 23, 1877.
St. Lucia, Cape of Good Hope } January 15, 1878.
Natal, Ceylon } February 4, 1878.
British Honduras, February 22, 1878.
Leeward Islands, March 26, 1878.
Malta, June 29, 1878.
Barbados, Sierra Leone } November 27, 1878.
Bermuda, February 4, 1879.
Griqualand West, June 26, 1879.
Grenada, March 18, 1880.
Tobago, June 28, 1880.
St. Vincent, August 6, 1880.
British Guiana, September 24, 1886, July 7, 1897.
Newfoundland, January 29, 1900.
Commonwealth of Australia, March 7, 1904.

In the Straits Settlements the surrender to foreign States of persons accused or convicted of certain crimes in cases where the Extradition Act does not apply (see Straits Settlements Act, 1866 (29 & 30 Vict. c. 115), s. 2) is provided for by Orders in Council of June 26, 1879, December 31, 1883, November 29, 1884, August 19, 1889, September 26, 1901, July 15, 1904 (Federated Malay States).

In Cyprus, extradition is provided for by Orders in Council, made under the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37). See Orders in Council, July 15, 1881, March 8, 1895, and December 12, 1895.

(*l*) Colonial Prisoners Removal Act, 1869 (32 & 33 Vict. c. 10), s. 4. Agreements have been sanctioned by Order in Council between the following colonies:—Straits Settlements and Labuan, October 24, 1870, November 28, 1889, reciprocal; Gibraltar and Ceylon, March 20, 1877, as to prisoners of European origin, from latter to former; Gibraltar and Malta, April 30, 1877, former to latter; Tobago and St. Vincent, May 16, 1878, reciprocal; Falkland Islands and Malta, May 3, 1882, former to latter; Grenada, St. Vincent, and St. Lucia, December 13, 1889, reciprocal between any two. Prisoners may be removed from Cyprus to Malta by Order in Council of December 31, 1883, made under the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 7.

(*m*) Colonial Prisoners Removal Act, 1884 (47 & 48 Vict. c. 31), ss. 2, 5, 18.

possession, as to the payment of costs, as to the mode of dealing with removed prisoners, as to subjecting any class of persons to removal, and as to other necessary matters (*n*). On the direction of His Majesty in Council, such laws may have effect given to them wholly or partly throughout His Majesty's dominions and on the high seas (*o*).

# Part III.—Laws of the Colonies.

## SECT. 1.—*Application of English Law.*

### SUB-SECT. 1.—*In General.*

Effect of mode of acquisition of colony.

**985.** The extent to which English law applies to a particular colony or possession depends primarily upon the manner in which that colony or possession became subject to the Crown. There is a great difference between the case of a colony or possession acquired by conquest or cession in which there was at the time an established system of law, and that of a colony or possession which originated by the settlement of British subjects in territory unoccupied by any civilised State, and where there was no established system of law at the time it was peaceably annexed to the British dominions (*a*). There is also the third case of a colony or possession acquired by conquest, where at the time of annexation to the British dominions there did

(*n*) When there are local legislatures and a central legislature, it is the central legislature which has power to make such laws (see Colonial Prisoners Removal Act, 1884 (47 & 48 Vict. c. 31), s. 18). This Act has been applied to Cyprus (October 17, 1884); to local jurisdiction constituted under the Africa Order in Council, 1889 (amongst such jurisdictions are those which have developed into Uganda, the Nyasaland Protectorate, North-Eastern Rhodesia, under various Orders in Council, which save the provisions of the Africa Order in Council on this subject); to the Pacific Ocean and the islands and places therein, including British settlements and protectorates and places under no civilised government, except places within the jurisdiction of a British legislature or other civilised Power (March 15, 1893); to territories in South Africa within the boundaries of British Bechuanaland, the German protectorate, the rivers Chobe and Zambesi, the Portuguese possessions, and the South African Republic (Transvaal) (October 26, 1896) (these territories are now known as the Bechuanaland Protectorate and Southern Rhodesia); to the protectorates of Northern Nigeria (March 16, 1902), and Southern Nigeria (March 6, 1902); Weihaiwei (July 24, 1901); the East Africa Protectorate (July 11, 1905); the territories of East Africa bounded on the east and north-east by the Indian Ocean, the river Juba, and the south-western boundary of the Italian sphere, on the north by the Abyssinian frontier, on the west by the Uganda Protectorate, and on the south by the German sphere, with all the adjacent islands between the mouths of the Juba and Umba (August 11, 1902 and July 11, 1905). A general Order in Council of September 9, 1907, provides for the removal of prisoners to the United Kingdom or a British possession, as to the serving of sentences (arts. 1 and 2), and the action of the Secretary of State (arts. 3 and 4), but does not affect agreements made under the Act of 1869.

(*o*) Colonial Prisoners Removal Act, 1884 (47 & 48 Vict. c. 31), s. 12. No colonial laws have been passed under this section, the procedure provided by the Act and by the Order in Council of September 9, 1907 (made under s. 4) being regarded as sufficient.

(*a*) *Cooper* v. *Stuart* (1889), 14 App. Cas. 286, 291, P. C.; see 1 Bl. Com. 107.

SECT. 1. Application of English Law.

exist a system of law, which, although adapted to the requirements of the native population, was insufficient for and unsuitable to the requirements of the European settlers (*b*).

SUB-SECT. 2.—*Conquered or Ceded Colonies.*

Continuance of ancient law, until abrogation.

**986.** In conquered or ceded countries which, at the time of their acquisition, had already laws of their own, the Crown has power to alter and change those laws, but until this is actually done the ancient laws of the country remain in force (*c*), except where such ancient laws are based on religious or ethical principles inconsistent with European civilisation, as, for instance, in the case of territory acquired from an organised but savage State (*d*). In such a case, in the absence of any agreement by the Crown to preserve such ancient laws, such repugnant laws are *ipso facto* abrogated, and until certain laws are established in place of them the King, by himself and by such judges as he shall appoint, has power to judge them according to natural equity, as was done before certain municipal laws were given (*e*). Even in the case where there is an established system of law, any enactment contrary to our religion, or which is *malum in se*, does not remain in force (*f*).

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(*b*) As in the case of India (see p. 613, *post*); *Freeman* v. *Fairlie* (1828), 1 Moo. Ind. App. 305. "I apprehend the true general distinction to be, in effect, between the countries in which there are not, and countries in which there are, at the time of their acquisition, any existing civil institutions and laws, it being, in the first of those cases, matter of necessity that the British settlers should use their native laws, as having no other to resort to; whereas in the other case there is an established *lex loci* which it might be highly inconvenient all at once to abrogate; and, therefore, it remains till changed by the deliberative wisdom of the new legislative power. In the former case, also, there are not, but in the latter case there are, new subjects to be governed, ignorant of the English laws, and unprepared, perhaps, in civil and political character to receive them. The reason why the rules are laid down in books of authority, with reference to the distinction between new-discovered countries on the one hand, and ceded or conquered countries on the other, may be found, I conceive, in the fact that this distinction had always, or almost always, practically corresponded with that between the absence and the existence of a *lex loci*, by which the British settlers might, without inconvenience, for a time, be governed; for the powers from whom we had wrested colonies by conquest, or had obtained them by treaties of cession, had ordinarily, if not always, been civilised and Christian States, whose institutions, therefore, were not wholly dissimilar to our own. But in the settlements formed by the East India Company in Bengal the case was very different, and one to which neither of the rules referred to could possibly have an entire application. . . . Some new course was to be taken in this peculiar case; and the course actually taken seems to have been to treat the case in a great measure like that of a new-discovered country, for the Government of the Company's servants, and other British or Christian settlers using the laws of the mother country, as far as they were capable of being applied for that purpose, and leaving the Mahomedan and Gentoo inhabitants to their own laws and customs, but with some particular exceptions that were called for by commercial policy, or the convenience of mutual intercourse" (Master's Report, at p. 324).

(*c*) *Campbell* v. *Hall* (1774), 20 State Tr. 239, 323; *Forbes* v. *Cochrane* (1824), 2 B. & C. 448, *per* HOLROYD, J., at p. 463.

(*d*) 1 Bl. Com. 108; *Calvin's Case* (1608), 7 Co. Rep. 1, 17; *Dutton* v. *Howell* (1693), Show. Parl. Cas. 24, 31.

(*e*) *Calvin's Case, supra.*

(*f*) *Blankard* v. *Galdy* (1693), 4 Mod. Rep. 215, 225; *Memorandum* (1722), 2 P. Wms. 75. See also the arguments on the special verdict in *R.* v. *Picton*

SECT. 1. Application of English Law.

In some cases the law of England has been applied to the conquered country. In such a case the effect is to apply to the colony the common law and the statute law so far as they existed, either at the date of the application or at some other specified date, and were not merely in the nature of law of local policy adapted solely to England, but were general regulations equally applicable to any country governed by English law (*g*). Statutes enacted subsequently to the application of English law have no force in the colony, except in cases in which it is expressly provided that they shall so apply (*h*). This application of English law has taken place in Grenada (*i*), St. Vincent (*j*), Dominica (*k*), St. Lucia (*l*), the Gold Coast (*m*), Gibraltar (*n*), and also in Cyprus (except as to Ottoman subjects) (*o*).

English statute law—how far effective.

In the case of Penang, one of the Straits Settlements, as there is no trace of any laws having been established there before it was acquired by the East India Company, it is immaterial whether it should be regarded as ceded or as settled territory. In either case the law of England, so far as applicable, must be taken to be the governing law (*p*). In other colonies the ancient laws have been left in force, except so far as they may have been altered by subsequent legislation. Thus in Ceylon (*q*), the Cape of Good Hope (*r*), Natal (*s*), the Transvaal, and the Orange Free State the Roman-Dutch law prevails. In Ceylon the Hindu inhabitants of the northern province are governed by customs called the Tesawalamai. Where these customs are silent the Roman-Dutch law applies (*a*). The Mahomedans are governed by their own laws and usages. The Kandyans are governed by their own laws; when these are silent

Instances of continuance of existence of native law

(1810), 30 State Tr. 529, 883—955. In this case the point was whether a law permitting the infliction of torture was abrogated by conquest and annexation to the British dominions. No judgment, however, was given. See also *Mostyn* v. *Fabrigas* (1774), 20 State Tr. 81, *per* DE GREY, C.J., at p. 181: "The torture, as well as banishment, was the old law of Minorca, which fell, of course, when it came into our possession. Every English governor knew he could not inflict the torture: the constitution of this country put an end to that idea." See also *Bakare* v. *Denton* (1900), Journal of the Society of Comparative Legislation (N. S.), Vol. II., p. 473.

(*g*) *A.-G.* v. *Stewart* (1817), 2 Mer. 143, 160.

(*h*) *R.* v. *Vaughan* (1769), 4 Burr. 2494.

(*i*) By Proclamations of 19th December, 1764, and 10th January, 1784, printed in the 1875 edition of The Laws of Grenada, pp. 7—11.

(*j*) By Proclamation of 7th October, 1763, printed in Shepherd, Colonial Practice of St. Vincent, p. xix.

(*k*) *Ibid.*

(*l*) In cases where the codes are silent, as it existed in 1870.

(*m*) As it existed 24th July, 1874.

(*n*) As it existed 31st December, 1883 (Order in Council, 2nd February, 1884).

(*o*) As on 13th July, 1878, by the Cyprus Courts of Justice Order, 1882 (Statutory Rules and Orders Revised, Vol. V., Foreign Jurisdiction, p. 341).

(*p*) *Neo* v. *Neo* (1875), L. R. 6 P. C. 381, 392.

(*q*) *Hettihewage Siman Appu* v. *Queen's Advocate* (1884), 9 App. Cas. 571, P. C.

(*r*) *Scott* v. *A.-G.* (1886), 11 P. D. 128.

(*s*) *Molyneux* v. *Natal Land and Colonization Co.*, [1905] A. C. 555, P. C.

(*a*) The text of the Tesawalamai is set out in Vol. I. of the Revised Legislative Enactment of Ceylon. See also *Puthatampi* v. *Mailvo Kanam* (1897), 3 Ceylon New Law Rep. 42; *Sahapathi* v. *Svapra Kanam* (1904), 8 *ibid.* 62.

SECT. 1. Application of English Law.

the Roman-Dutch law applies (*b*). This is also the case in British Guiana (*c*) under an express stipulation made at the conquest. In Mauritius the Code Napoléon (*d*), the Code de Procedure Civile, the Code de Commerce, and the Code d'Instruction Criminelle remain in force; the Code Pénal, however, which was promulgated subsequently to the conquest, never applied. In the Province of Quebec the Coutume de Paris (*e*) and particular laws made for New France were the law at the time of the conquest, but on 26th May, 1866, a civil code, based on the Code Napoléon, was promulgated. This was followed by a Code de Procedure Civile, which was promulgated 22nd June, 1867. In Trinidad the old Spanish law as it stood in 1797 remains in force (*f*). In St. Lucia the Coutume de Paris remained in force (*g*), but it is now included in the Civil Code of St. Lucia, 1879, and the Code of Civil Procedure of St. Lucia, 1881.

SUB-SECT. 3.—*Settled Colonies.*

Distinction between common and statute law as to applicability.

**987.** In the case of colonies acquired by settlement the common law of England and the statute law as existing at the date of the formation of the colony apply, but not statutes subsequently enacted, unless they are expressly directed to apply (*h*). This principle is, however, subject to this restriction, that so much only of the law of England is carried with them by the colonists as is applicable to their situation and the condition of an infant colony. Thus, while the general laws of inheritance and of protection from

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(*b*) Ordinance 5 of 1852, s. 5.

(*c*) *McDermott* v. *British Guiana* (*Judges*) (1868), L. R. 2 P. C. 341.

(*d*) *D'Epinay* v. *Cockerell* (1836), 1 Moo. P. C. C. 103; *Sérandat* v. *Saisse* (1866), L. R. 1 P. C. 152; *Her Majesty's Procureur* v. *Bruneau* (1866), *ibid.* 169; *Lagesse* v. *Lagesse* (1872), L. R. 4 P. C. 553.

(*e*) By an edict of April, 1663 (see Montigny, Histoire du Droit Canadien). By a proclamation of 7th October, 1763 (printed in Shepherd, Colonial Practice of St. Vincent, p. xix), it was promised that pending the making of laws "as near as may be agreeable to the laws of England . . . all persons inhabiting in or resorting to our said colonies (including *inter alia* Quebec) may confide in our royal protection for the enjoyment of the benefit of the laws of our realm of England." This proclamation never became effective in Quebec, except so far as it extended to the inhabitants of Canada the benefit of the English criminal law (*A.-G.* v. *Stewart* (1817), 2 Mer. 143, 158).

(*f*) *Escallier* v. *Escallier* (1885), 10 App. Cas. 312, P. C.; *R.* v. *Picton* (1810), 30 State Tr. 529, 883.

(*g*) *Du Boulay* v. *Du Boulay* (1869), L. R. 2 P. C. 430; and see Laws of St. Lucia, p. 1.

(*h*) *Memorandum* (1722), 2 P. Wms. 75; *The Lauderdale Peerage* (1885), 10 App. Cas. 692. "When the province of New York was founded by the English settlers who went out there, those English settlers carried with them all the immunities and privileges and laws of England. The Englishmen in a province which had been so settled were as free Englishmen, with as much privilege, as those who remained in England. It is true that it is only the law of England as it was at that time that such settlers carry with them; subsequent legislation in England altering the law does not affect their rights unless it is expressly made to extend to the province or colony. It is equally true that in all the books or *dicta* in which that rule is laid down there is always a qualification put in somewhat of this sort: the settlers who go out carry out the law so far as it is applicable to their new situation. That is a vague and general kind of phrase, but I think it has sound sense in it" (*per* Lord BLACKBURN, at p. 744).

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personal injuries are introduced, it is not so with enactments relating to the property of a great and commercial nation, to police and revenue, the Established Church, ecclesiastical courts, and similar subjects, which are inapplicable to the colonial circumstances (*i*). Thus, the law of mortmain (*k*), the Real Property Limitation Act, 1833 (*l*), the Wills Act, 1837 (*m*), and the Statute of Frauds (*n*) have been held not to apply to colonies. On the other hand, the Bankruptcy Act, 1883 (*o*), and the common law rule against perpetuities (*p*) have been held to so apply, except in the latter case as to Crown grants (*q*).

In the case of some settled colonies, the date on which the law of England is to be ascertained as applying to the colony has been fixed by enactment (*r*).

## SECT. 2.—*Imperial Legislation.*

Principles and practice of Imperial legislation for colonies.

**988.** The royal prerogative extends to the whole of His Majesty's dominions, and consequently the King has jurisdiction to legislate for all colonies by Order in Council until His Majesty grants, or even promises, a separate legislature, on which this jurisdiction ceases (*s*), except so far as there is a reservation in the promise or grant (*a*). This prerogative jurisdiction may be exercised by way

(*i*) 1 Bl. Com. 108. See, however, *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124. "Nothing is more difficult than to know which of our laws is to be regarded as imported into our colonies . . . The Act (Australian Courts Act, 1828 (9 Geo. 4, c. 83), says 'all the laws adapted to the situation of the colony.' Who is to decide whether they are adapted or not? That is a very difficult question" (*per* Lord CRANWORTH, at p. 161).

(*k*) *A.-G.* v. *Stewart* (1817), 2 Mer. 143 (Grenada); *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124 (New South Wales); *Jex* v. *McKinney* (1889), 14 App. Cas. 77, P. C. (British Honduras).

(*l*) 3 & 4 Will. 4, c. 27; *Pitt* v. *Dacre* (*Lord*) (1876), 3 Ch. D. 295 (Jamaica).

(*m*) 7 Will. 4 & 1 Vict. c. 26; *Re Goods of Foy* (1839), 2 Curt. 328.

(*n*) 29 Car. 2, c. 3, s. 12, repealed by Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26); *Memorandum* (1722), 2 P. Wms. 75 (Barbados).

(*o*) 46 & 47 Vict. c. 52; *Callender Sykes & Co.* v. *Colonial Secretary of Lagos and Davies*, [1891] A. C. 460, P. C.

(*p*) *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L. R. 6 P. C. 381, at p. 394.

(*q*) *Cooper* v. *Stuart* (1889), 14 App. Cas. 286, P. C.

(*r*) *E.g.*, in British Columbia as on 19th November, 1858, subject, however, as to either part (Vancouver's Island or the continental part of British Columbia) to past colonial legislation (Ordinance 7 of 1867); Fiji, 2nd January, 1875 (Ordinance 7 of 1875); Hong Kong, 5th April, 1843 (Ordinance 3 of 1873); Ontario, 15th October, 1792 (Consolidated Statutes, 1859); New South Wales (then including Queensland, South Australia, Victoria, and Western Australia), and Tasmania, 25th July, 1828 (Australian Courts Act, 1828 (9 Geo. 4, c. 83), s. 24). In the case of the Falkland Islands, by Ordinance No. 3 of 1900, s. 31, "Subject to all local ordinances and Orders in Council in force for the time being, so much of the law of England, for the time being, as is applicable to local circumstances, is and shall be in force in this colony, so far as it is suitable and appropriate, and only to such qualification as local circumstances render necessary."

(*s*) See *Re Bateman's Trust* (1873), L. R. 15 Eq. 355; *Campbell* v. *Hall* (1774), 20 State Tr. 239.

(*a*) There is such a reservation of the right to legislate by Order in Council in the case of Gibraltar, St. Helena, Ceylon, the Falkland Islands, Fiji, the Gambia, the Gold Coast, Hong Kong, Malta, Mauritius, Seychelles, Sierra Leone, Southern Nigeria, the Straits Settlements, Trinidad and Tobago, Grenada, St. Lucia, St. Vincent, and British Guiana.

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of charter under the Great Seal as well as by Order in Council (*b*). All colonies, being held of the Crown of the United Kingdom, are subject to the Imperial Parliament (*c*). In practice, however, the jurisdiction to legislate for colonies having a separate legislature is usually exercised only when legislation outside the powers of the local legislature is required. Circumstances, however, may arise that will necessitate the intervention of the Imperial Parliament (*d*). The Imperial Parliament also makes enactments dealing with the whole of His Majesty's dominions in respect of matters which affect the interests of the entire Empire as distinguished from those of particular parts thereof.

Instances of such legislation.

Accordingly, besides the Constitution Acts and the Act for confirming certain Colonial Constitutional Acts which have been already mentioned (*e*), there have been passed, among others (*f*), the following Imperial Acts relating to the colonies—the Colonial Laws Validity Act, 1865 (*g*); the Fugitive Offenders Act, 1881 (*h*), under which persons charged with any of certain offences can be arrested in any part of His Majesty's dominions other than that in which the offence is alleged to have been committed, and conveyed to the part whence he is a fugitive for trial and punishment; the Extradition Acts, 1870 and 1873 (*i*), which are made to meet in the colonies the case of persons found there charged with having committed offences in foreign countries; the Colonial Prisoners Removal Acts, 1869 and 1884 (*k*), by which prisoners may be transported on certain conditions from one colony to another; the British Law Ascertainment Act, 1859 (*l*), which enables suitors to ascertain the law of one part of His Majesty's dominions for the purpose of trials in any other part; the Foreign Tribunals Evidence Act, 1856 (*m*), under which evidence can be taken in relation to civil and commercial matters pending before foreign tribunals, subsequently extended (*n*) to non-political criminal matters; the Documentary Evidence Acts, 1868 and 1882 (*o*); the Acts for taking evidence in the United Kingdom, India, or the colonies for

(*b*) *Jephson* v. *Riera* (1835), 3 Knapp, 130, 151.

(*c*) *Campbell* v. *Hall* (1774), 20 State Tr. 239, *per* Lord MANSFIELD at cols. 322, 323; May, Parliamentary Practice, 11th ed., p. 37; "Of the powers and jurisdiction of the Parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds" (4 Co. Inst. 36).

(*d*) As for instance the suspension of the constitution of Lower Canada in 1838 by stat. (1838) 1 & 2 Vict. c. 9 and stat. (1839) 2 & 3 Vict. c. 53.

(*e*) Pp. 506 *et seq.*, *ante*.

(*f*) A full list is given in Tarring's Law Relating to the Colonies, 3rd ed., chap. 6.

(*g*) 28 & 29 Vict. c. 63; see p. 536, *ante*.

(*h*) 44 & 45 Vict. c. 69; see p. 562, *ante*.

(*i*) 33 & 34 Vict. c. 52, ss. 17, 18; 36 & 37 Vict. c. 60, s. 1. Their operation may be suspended by Order in Council within any British possession so long as provision is therein made by law for surrendering fugitive criminals, or any such law may be made to have effect as if part of the Act.

(*k*) 32 Vict. c. 10; 47 & 48 Vict. c. 31; see p. 564, *ante*.

(*l*) 22 & 23 Vict. c. 63; see p. 559, *ante*.

(*m*) 19 & 20 Vict. c. 113.

(*n*) By the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 24.

(*o*) 31 & 32 Vict. c. 37; 45 & 46 Vict. c. 9.

use in any court or tribunal in His Majesty's dominions (*p*); the Evidence (Colonial Statutes) Act, 1907 (*q*); the Colonial Courts of Admiralty Act, 1890 (*r*), by which colonial legislatures may confer admiralty jurisdiction on their supreme and inferior courts, which are also authorised to act as prize courts (*s*); the Admiralty Offences (Colonial) Act, 1860 (*t*), which enables colonies to legislate as to the trial of offences concerning persons dying at sea or otherwise abroad of hurts received within the legislating colonies respectively; the Naval Prize Act, 1864 (*a*); the Colonial Naval Defence Act, 1865 (*b*); the Colonial Probates Act, 1892 (*c*), which provides for the recognition within the United Kingdom of probate and letters of administration granted in British possessions; the British Settlements Act, 1887 (*d*), which provides for the government of British settlements in places where no civilised government exists; the Colonial Boundaries Act, 1895 (*e*); the Colonial Marriages Act, 1865 (*f*); the Pensions (Colonial Service) Act, 1887 (*g*); the Colonial Governors (Pensions) Acts, 1865 and 1872 (*h*); the Colonial Solicitors Act, 1900 (*i*); the sections of the Foreign Jurisdiction Act, 1890 (*j*), which provide for the trial in British possessions of persons charged with having committed offences in foreign countries where His Majesty has jurisdiction, and for carrying into effect in British possessions of sentences passed by British courts in foreign countries; the Demise of the Crown Act, 1901 (*k*), which makes fresh appointments to offices in His Majesty's dominions on the decease of the Sovereign unnecessary; and the following Acts which primarily concern the United Kingdom or part of it, but which comprise provisions which extend or apply to the colonies, namely: certain Copyright Acts (*l*); the Medical Practitioners Acts (*m*), providing for registration in England and the colonies and for reciprocity; the Dentists Act, 1878 (*n*); the Naturalization Act, 1870 (*o*); the Foreign Enlistment Act,

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(*p*) Evidence by Commission Act, 1859 (22 Vict. c. 20); Evidence by Commission Act, 1885 (48 & 49 Vict. c. 74).
(*q*) 7 Edw. 7, c. 16.
(*r*) 53 & 54 Vict. c. 27; see p. 557, *ante*.
(*s*) Prize Courts Act, 1894 (57 & 58 Vict. c. 39), s. 2 (3).
(*t*) 23 & 24 Vict. c. 122; see p. 539, *ante*.
(*a*) 27 & 28 Vict. c. 25.
(*b*) 28 & 29 Vict. c. 14.
(*c*) 55 Vict. c. 6; see p. 559, *ante*.
(*d*) 50 & 51 Vict. c. 54; see p. 572, *post*.
(*e*) 58 & 59 Vict. c. 34.
(*f*) 28 & 29 Vict. c. 64.
(*g*) 50 & 51 Vict. c. 13.
(*h*) 28 & 29 Vict. c. 113; 35 & 36 Vict. c. 29; see p. 532, *ante*.
(*i*) 63 & 64 Vict. c. 14.
(*j*) 53 & 54 Vict. c. 37, ss. 6, 7, 9.
(*k*) 1 Edw. 7, c. 5.
(*l*) 5 & 6 Vict. c. 45 (1842); 7 & 8 Vict. c. 12 (1845); 10 & 11 Vict. c. 95 (1847); 15 & 16 Vict. c. 12 (1852); 49 & 50 Vict. c. 33 (1886), ss. 8, 9.
(*m*) 21 & 22 Vict. c. 90 (1858), s. 46; 49 & 50 Vict. c. 48 (1886), Part II.; 5 Edw. 7, c. 14 (1905).
(*n*) 41 & 42 Vict. c. 33.
(*o*) 33 & 34 Vict. c. 14; colonial naturalisation only has effect within the limits of the particular colony.

SECT. 2. Imperial Legislation.

1870 (*p*), which enforces neutrality upon His Majesty's subjects in case of war between foreign States at peace with His Majesty; the Territorial Waters Jurisdiction Act, 1878 (*q*), which empowers colonial courts to deal with charges of offences alleged to have been committed at sea within a certain distance of the coast; the Army Act, 1881 (*r*), which enables the colonies to provide for the discipline of the forces when abroad; the Bankruptcy Act, 1883 (*s*), which makes bankruptcy courts in the United Kingdom and in the colonies auxiliary to each other; the Merchant Shipping Act, 1894 (*a*), as to registry of shipping, masters, and seamen, passenger and emigrant ships, safety of navigation, lighthouses etc.

Legislation by Order in Council.

The power of the King to legislate by Order in Council for a conquered colony is abrogated by a proclamation promising to call an assembly to enact laws (*b*). In the case of New Zealand it is expressly enacted by the Imperial Parliament (*c*) that, whereas it may be expedient that the laws, customs, and usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained, it shall be lawful for the King by letters patent to make provision for the maintenance of those laws, customs, and usages, and to set apart particular districts within which they are to be observed, notwithstanding any repugnance of such laws, statutes, or usages to the laws of England or of New Zealand.

Legislation and administration in barbarous countries.

**989.** In cases where settlements have been made in barbarous or desolate countries, and no legal form of government or constitution has been established, the provisions of the British Settlements Act, 1887 (*d*), apply. This Act empowers His Majesty by Order in Council to make laws and establish courts and regulate proceedings within any British settlement (*e*); to delegate to any three or more persons within the settlement all or any of the powers given by the Act to His Majesty in Council (*f*); and to confer on any court in any British possession any such jurisdiction, civil or criminal, original or appellate, in respect of matters occurring in any British settlement as might be conferred by virtue of the Act on a court in the settlement (*g*). A British settlement is defined by the Act (*h*) as being a British possession which has not been

(*p*) 33 & 34 Vict. c. 90.
(*q*) 41 & 42 Vict. c. 73.
(*r*) 44 & 45 Vict. c. 58.
(*s*) 46 & 47 Vict. c. 52, ss. 118, 168.
(*a*) 57 & 58 Vict. c. 60, Parts I., II. (see ss. 261, 264 as to application of), III. (see ss. 365—367), V. (see s. 478), VIII. (see ss. 558, 670—675), XIII. (see ss. 690 [3 b], 691, 699), XIV. (see ss. 723, 735 (by which the legislature of any British possession may repeal any provisions of the Act relating to ships registered in that possession, subject to reservation for His Majesty's approval except those in Part III. relating to emigrant ships), s. 736).
(*b*) *Hall* v. *Campbell* (1774), 1 Cowp. 204, 213.
(*c*) New Zealand Constitution Act, 1852 (15 & 16 Vict. c. 72), s. 71.
(*d*) 50 & 51 Vict. c. 54.
(*e*) *Ibid.*, s. 2.
(*f*) *Ibid.*, s. 3.
(*g*) *Ibid.*, s. 4.
(*h*) *Ibid.*, s. 6.

acquired by cession or conquest, and is not for the time being within the jurisdiction of the legislature, constituted otherwise than by virtue of the Act, or any Act repealed thereby, of any British possession.

## SECT. 3.—*Channel Islands.*

### SUB-SECT. 1.—*Application of English Law.*

Part of His Majesty's dominions.

**990.** The Channel Islands are not part of the United Kingdom, but are included in His Majesty's dominions, and form part of the British Islands (*i*). They are the only part of the Duchy of Normandy remaining subject to the Crown, of which duchy they formed part until 1205, when the remainder of the duchy was conquered by Philippe Auguste, King of France.

Nature of law in.

The English common law does not extend to the Channel Islands, in which the law is based on the customs of Normandy as in 1205, which are contained in the Ancienne Coutume (*k*) and the Grand Coutumier du Pays et Duché de Normandie (*l*). The Roman law did not prevail in the Duchy of Normandy (*a*).

English statute law does not apply to the Channel Islands except in the case of statutes especially directed to apply either to all His Majesty's dominions or specially to the Channel Islands.

### SUB-SECT. 2.—*Imperial Legislation.*

Legislation by statute.

**991.** As in the case of the whole of His Majesty's dominions, the Imperial Parliament has jurisdiction to legislate for the Channel Islands (*b*). Statutes having effect in the Channel Islands are registered in the Royal Courts of Jersey, Guernsey, and Alderney (*c*).

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(*i*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18.

(*k*) In 1574 was published "Commentaires du Droict Civile, tant public que privé, observé au Pays et Duché de Nordmandee," by Guillaume Terrien, Lieutenant-General du Bailli de Dieppe. Lord WESTBURY in *La Cloche* v. *La Cloche* (1870), L. R. 3 P. C. 125, at p. 136, said: "The Commentary of Terrien, therefore, may be reasonably regarded as the best evidence of the old custom of Normandy, and also of the Channel Islands before the separation of Normandy from the English Crown."

(*l*) Rouen, 1539. This edition contains a Latin commentary by Rouille of Alençon, composed in 1533. An edition based on this was published in 1881 by W. M. De Gruchy, Juré-Justicier á la Cour Royale de l'Isle de Jersey. In 1881 also E. J. Tardif published "Le Tres Ancien Coutumier de Normandie," which seems to belong to the early part of the thirteenth century.

(*a*) *Falle* v. *Godfray* (1888), 14 App. Cas. 70, P. C. "It [*i.e.*, the Roman law] did not prevail in the Duchy of Normandy, from which the laws of Jersey are derived" (*per curiam*, at p. 75). See also *La Cloche* v. *La Cloche* (1870), L. R. 3 P. C. 125; (1872) L. R. 4 P. C. 325, 334; *Thornton* v. *Robins* (1837), 1 Moo. P. C. C. 439, 447, 453; *Dyson* v. *Godfray* (1884), 9 App. Cas. 726, 731, P. C. The Coutume de Paris and the Coutume d'Orléans may be referred to for the purpose of interpreting the customs of Jersey, but not as showing what is the law of Jersey (*La Cloche* v. *La Cloche*, *supra*, at p. 76).

(*b*) See p. 569, *ante*.

(*c*) In former times the island civil authorities have refused obedience to Acts which had been registered on the ground that they were contrary to the charter (see Bowditch's Treatise etc. on the Islands of Guernsey and Jersey etc., p. vi.). The civil authorities have also at times attempted to claim a right to suspend the registration of an Act of the Imperial Parliament, but such a claim seems to be inconsistent with the supremacy of Parliament. Further, by an Order in

SECT. 3. Channel Islands.

The principal subjects of Imperial legislation having effect in the Channel Islands are customs and excise (*d*), army and militia (*e*), extradition (*f*), friendly (*g*), industrial (*h*), and loan (*i*) societies, savings banks (*k*), sea fisheries (*l*), telegraphs (*m*), prohibition of growing tobacco (*n*), and the backing of warrants (*o*).

Legislation by Order in Council.

The Sovereign has also the power of legislating for the Channel Islands by Orders in Council, which, like the statutes, are registered in the Royal Courts of Jersey, Guernsey, and Alderney. A claim has been made that Orders in Council have the force of law in the Channel Islands only after registration. The Crown, on the other hand, contends that registration is not necessary to give validity to Orders in Council, and that the object of registration is to preserve a record and give public notice of the making of them, so that the people of the islands may conform thereto (*p*). This question appears never to have been actually decided, but on several occasions Orders in Council which were obnoxious to the States have been withdrawn.

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Council, of 7th May, 1806, it is laid down that the registration of an Act of Parliament, in which the islands are named, is not essential to the operation thereof, and that His Majesty's subjects in the islands of Jersey, Guernsey, and Alderney are bound by law to take notice thereof, though no registration should take place (Le Cras's Laws of Jersey, p. 70).

(*d*) Excise on Spirits Act, 1860 (23 & 24 Vict. c. 129), s. 5; Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36); Customs Buildings Act, 1879 (42 & 43 Vict. c. 36); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), ss. 7, 8; Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 4, 5.

(*e*) Army Act, 1881 (44 & 45 Vict. c. 58).

(*f*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69); Extradition Act, 1870 (33 & 34 Vict. c. 52).

(*g*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25).

(*h*) Industrial and Provident Societies Acts, 1893 and 1894 (56 & 57 Vict. c. 39; 57 & 58 Vict. c. 8).

(*i*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110).

(*k*) Savings Bank Act, 1833 (3 & 4 Will. 4, c. 14); Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87); Savings Banks Act, 1887 (50 & 51 Vict. c. 40); Savings Banks Act, 1891 (54 & 55 Vict. c. 21); Savings Bank Act, 1893 (56 & 57 Vict. c. 69); Savings Banks Act, 1894 (4 Edw. 7, c. 8).

(*l*) See Fisheries Act, 1843 (6 & 7 Vict. c. 79); Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45); Fisheries (Oyster, Crab and Lobster) Act, 1877 (40 & 41 Vict. c. 42).

(*m*) Telegraph Acts, 1870, 1885, and 1892 (33 & 34 Vict. c. 88; 48 & 49 Vict. c. 58; 55 & 56 Vict. c. 59); Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24).

(*n*) 12 Car. 2, c. 34 (1660); 15 Car. 2, c. 7 (1663); Tobacco Cultivation Act, 1831 (1 & 2 Will. 4, c. 13).

(*o*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42); Indictable Offences (Ireland) Act, 1849 (12 & 13 Vict. c. 69); Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55); Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93); Indictable Offences Act Amendment Act, 1868 (31 & 32 Vict. c. 107).

(*p*) *Re The States of Jersey* (1853), 9 Moo. P. C. C. 185. This case was heard before a Committee of the Privy Council for the Affairs of Jersey and Guernsey (see Order in Council of 24th January, 1901, Statutory Rules and Orders Revised, Vol. I., Channel Islands, p. 1). The committee considered that serious doubts existed whether the establishment of laws for Jersey without the consent of the States thereof was consistent with the constitutional rights of the island (*Re States of Jersey, supra*, at p. 262).

Channel Islands.

Legislature of Jersey.

**992.** In the Channel Islands, Jersey has a legislative body known as "The States," consisting of a bailiff, appointed by the Crown, and holding office during pleasure, twelve jurats elected for life by the ratepayers, twelve rectors of parishes, appointed by the Crown for life, and twelve constables of parishes elected by the ratepayers for three years, and fourteen deputies elected for three years (three from the parish of St. Heliers and one each from the other eleven parishes). The States can pass laws which are of force for three years. If they are approved by His Majesty in Council, and registered in the Royal Court, they become permanent (*q*). The bailiff and the twelve jurats constitute the Royal Court, of which the bailiff, who is always a trained lawyer, is president, but with only a casting vote. He appoints a lieutenant bailiff to act in his absence, who is always a jurat. The jurats have no legal training, but must have a property qualification, and in many cases have served in some parochial office, *e.g.*, that of constable. In Guernsey the Royal Court, consisting of the bailiff and twelve jurats, has exercised, since the beginning of the 15th century, the right of acting as a legislative body, at certain courts called Chefs Plaids, the ordinances of which take effect without the consent of either the Privy Council, the Governor, or the people, but must not militate against an Order in Council, or a law passed by a superior authority. The States, which consist of the bailiff, twelve elected jurats, rectors of parishes, the procureur, and one constable from each of the ten parishes, discuss projects of law sent up by the Royal Court, which, if agreed to, require the assent of the Sovereign in Council in order to become law (*r*).

Legislature of Guernsey

Jersey, provisional and permanent legislation in.

**993.** The States of Jersey have power to enact, repeal, and amend provisional laws having force for three years (*s*) without receiving the royal assent, provided that such provisional laws are not repugnant to any Act of Parliament or Order in Council relevant to the island, do not touch the prerogative of the Crown, or the rights or privileges of the King's subjects, and are not contrary to the customs of Normandy (*t*). Laws enacted by the States which have received royal assent are permanent in their operation.

Codification.

The laws of Jersey were codified in 1771, and the subsequent Acts of the States and Orders in Council are printed in an official publication entitled the "Recueil des Lois."

Guernsey, legislation in, etc.

**994.** The States of Guernsey have similar powers of legislation to those of Jersey, and in addition have power to legislate for the island of Alderney, subject to disallowance by the King in

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(*q*) See Report of Royal Commission to Inquire into the Laws of Jersey, 1861, p. vi.; *Re States of Jersey* (1853), 9 Moo. P. C. C. 185; (1858) 11 Moo. P. C. C. 320; (1862) 15 Moo. P. C. C. 195.

(*r*) See Duncan's History of Guernsey, chap. 8; *Re Royal Court of Guernsey (Bailiff and Jurats)* (1844), 5 Moo. P. C. C. 49; *Martyn* v. *M'Cullock* (1837), 1 Moo. P. C. C. 308.

(*s*) Order in Council, 28th March, 1771 (Le Cras, Laws of Jersey, p. 310).

(*t*) Le Cras, Laws of Jersey, p. 15.

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Council (*u*). The States of Alderney seem not to have any powers of legislation. The islands of Sark, Herm, and Jethou are dependencies of the bailiwick of Guernsey (*v*). Sark has a representative assembly and courts of justice of its own, while Herm and Jethou have none, being wholly dependent upon and subject to Guernsey (*x*).

## SECT. 4.—*Isle of Man.*

### SUB-SECT. 1.—*Application of English Law.*

Part of His Majesty's dominions.

**995.** The Isle of Man is not part of the United Kingdom (*a*), but forms part of the British Islands (*b*), and is included in His Majesty's dominions. It is not a foreign dominion of the Crown (*c*). The sovereignty of the Isle of Man was purchased from the Duke of Athol by the Crown in 1765 (*d*).

Nature of law in.

The common law of England does not extend to the Isle of Man (*e*), in which the laws are based on the ancient customary laws of the island (*f*).

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(*u*) The only collections of the laws of Guernsey which appear to have been published are the following:—(1) Approbation des lois, coutumes et usages de l'île de Guernsey imprimé sur l'edition de 1715, Guernsey, 1822; (2) changes effected in the laws of Guernsey in 1823, to which are prefixed the report of the Royal Commission deputed to that island in 1815. The observations of the Royal Court, and the answers of . . . the lords of His Majesty's . . . Privy Council, Guernsey, 1823. See also Second Report on the State of the Criminal Law in the Channel Islands (Guernsey), Parliamentary Paper, 1847-1848 [Cd. 945], pp. xi.—xv.

(*v*) Herm once made an unsuccessful attempt to assert independence of Guernsey (*Martyn* v. *M'Cullock* (1837), 1 Moo. P. C. C. 308). As to Guernsey generally, see also Berry, History of Guernsey.

(*x*) *Martyn* v. *McCullock*, *supra*.

(*a*) *Davison* v. *Farmer* (1851), 6 Exch. 242; Johnson, Jurisprudence of the Isle of Man, p. 33.

(*b*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (1). Official service in the Isle of Man qualifying for a superannuation allowance out of the Island revenues is, for pension purposes, deemed service in His Majesty's permanent Civil Service (Isle of Man (Officers) Act, 1876 (39 & 40 Vict. c. 43), s. 1). If the salary and emoluments of an office formerly held in the Isle of Man or His Majesty's permanent Civil Service is greater than that of the office from which retirement takes place, the allowance as to the years reckoned towards superannuation at date of cessation of the larger salary is calculated on the basis of the same amount as if retirement had taken place at that date (Isle of Man (Officers) Act, 1882 (45 & 46 Vict. c. 46), s. 1).

(*c*) *Ex parte Brown* (1864), 5 B. & S. 280; and therefore the writ of *habeas corpus* runs to the Isle of Man at common law, notwithstanding the prohibition of the Habeas Corpus Act, 1862 (25 & 26 Vict. c. 20), of the issue of this writ from England to any foreign dominion of the Crown possessing courts competent to grant it.

(*d*) For £70,000; Isle of Man Purchase Act, 1765 (5 Geo. 3, c. 26); see also 45 Geo. 3, c. 123. As to the constitutional history of the Isle of Man, see Burge, Commentaries on Colonial and Foreign Law, new edition, 1907, Vol. I., p. 128.

(*e*) See Lord HARDWICKE, L.C., in *Sodor and Man* (*Bishop*) v. *Derby* (*Earl*) (1751), 2 Ves. Sen. 337, at p. 350; 5 Com. Dig. tit. Navigation (F 2), 153.

(*f*) *Blankard* v. *Galdy* (1693), 2 Salk. 411, 412; Isle of Man Purchase Act, 1765 (5 Geo. 3, c. 26). Between 1678 and 1690 John Parr, who was Deemster from 1693 to 1713, compiled "An Abstract of the Laws, Customs and Ordinances of the Isle of Man." This work has never been printed, but

SUB-SECT. 2.—*Imperial Legislation.*

Mode and subjects of Imperial legislation.

**996.** Statutes of the Imperial Parliament which apply to the whole of His Majesty's dominions, or in which the Isle of Man is specially named, or which by necessary implication apply to it, are in force in that island (*g*).

The principal subjects in respect of which the Imperial Parliament has legislated for the Isle of Man are—customs (*h*), harbours (*i*), army and reserve forces etc. (*k*), patents and designs (*l*), trade marks (*m*), extradition (*n*), friendly societies (*o*), loan societies (*p*), savings banks (*q*), and telegraphs (*r*).

SUB-SECT. 3.—*Island Legislation.*

Constitution of legislature.

**997.** The legislature of the Isle of Man is the Court of Tynwald, composed of two houses,—the Governor in Council and the House of Keys. The Council consists besides the Governor, of the Bishop, the Archdeacon, the Vicar-General, the Attorney-General, the Clerk of the Rolls, the two Deemsters, and the Receiver-General, all appointed by the Crown except the Vicar-General, who is selected by the Bishop. The House of Keys has twenty-four members, elected for seven years, unless sooner dissolved by the Crown. The Governor, the two Deemsters, and the Clerk of the

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manuscript copies exist. It does not profess to be an abstract of the whole of the laws of the Isle of Man, but to be an abridgment or compendium of such laws and Acts as are of use. There is also a compilation entitled "The Ancient Customary Laws of the Isle of Man," arranged under thirty-nine heads. It is not known by whom or when this work was compiled; it exists only in manuscript.

(*g*) See *Sodor and Man* (*Bishop*) v. *Derby* (*Earl*) (1751), 2 Ves. Sen. 337.

(*h*) Isle of Man Customs, Harbours, and Public Purposes Act, 1866 (29 & 30 Vict. c. 23); Customs (Isle of Man) Tariff Act, 1874 (37 & 38 Vict. c. 46); Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36); Customs Buildings Act, 1879 (42 & 43 Vict. c. 36); Customs and Inland Revenue Acts, 1879 and 1881 (42 & 43 Vict. c. 21; 44 & 45 Vict. c. 12); Isle of Man (Customs) Acts, 1887, 1895, 1898, 1899, 1900, 1903, 1904, 1906, 1907 and 1908 (50 & 51 Vict. c. 5; 58 & 59 Vict. c. 38; 61 & 62 Vict. c. 27; 62 & 63 Vict. c. 39; 63 & 64 Vict. c. 31; 3 Edw. 7, c. 35; 4 Edw. 7, c. 25; 6 Edw. 7, c. 18; 7 Edw. 7, c. 26; 8 Edw. 7, c. 9).

(*i*) Isle of Man Harbours Act, 1863 (26 & 27 Vict. c. 86), and Isle of Man Harbours Amendment Act, 1864 (27 & 28 Vict. c. 62); Isle of Man Customs, Harbours, and Public Purposes Act, 1866 (29 & 30 Vict. c. 23); Isle of Man Harbours Acts, 1872, 1874, 1883, and 1884 (35 & 36 Vict. c. 23; 37 & 38 Vict. c. 8; 46 & 47 Vict. c. 9; 47 & 48 Vict. c. 7).

(*k*) Army Act, 1881 (44 & 45 Vict. c. 58); Reserve Forces Act, 1882 (45 & 46 Vict. c. 48); Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9).

(*l*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29).

(*m*) Trade Marks Act, 1905 (5 Edw. 7, c. 15).

(*n*) Extradition Act, 1870 (33 & 34 Vict. c. 52); Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69).

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25).

(*p*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110).

(*q*) Trustee Savings Bank Act, 1863 (26 & 27 Vict. c. 87); Savings Banks Acts, 1887, 1891, 1893, and 1904 (50 & 51 Vict. c 40; 54 & 55 Vict. c. 21; 56 & 57 Vict. c. 69; 4 Edw. 7, c. 8).

(*r*) Telegraph Acts, 1870, 1885, and 1892 (33 & 34 Vict. c. 88; 48 & 49 Vict. c. 58; 55 & 56 Vict. c. 59); Telegraph (Isle of Man) Act, 1889 (52 & 53 Vict. c. 34); Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24).

SECT. 4. Isle of Man.

Rolls constitute the Court of Chancery, Exchequer, Common Law and Gaol Delivery. The Deemsters hold weekly courts of criminal jurisdiction.

Mode of legislation.

**998.** The legislature of the Isle of Man (*s*) has general power to legislate, but the Acts passed by it require to be approved by the King in Council and to be promulgated on the Tynwald Hill before they are valid. The promulgation takes place by reading a brief statement in Manx and English as to the purport of the Act and as to the royal assent, together with the title of the Act; after this the Governor and the Speaker of the House of Keys sign an attestation of the promulgation written at the foot of the Act.

The statutes of the Isle of Man have been revised up to 1895, and are published as Statutes Revised in five volumes.

# Part IV.—Jurisdiction of the English Courts.

## SECT. 1.—*Original Jurisdiction.*

### SUB-SECT. 1.—*Civil.*

How colonial judgments regarded and enforced in English courts.

**999.** For purposes of jurisdiction colonial courts are to be deemed foreign courts (*a*), and the colonies foreign countries (*b*); and the judgments of colonial courts are regarded in the same light as foreign judgments (*c*). To enforce them in England an action must be brought upon them, and execution taken out on the English judgment so obtained (*d*).

Action for same object in colonial and English courts.

**1000.** The fact that an action is pending in a colonial court between the same parties arising out of the same transactions is not of itself enough to bar an action in England (*e*). For instance, it would be contrary to justice to say that if one person had got a decree in one country which he had not chosen to prosecute, such decree, notwithstanding its non-prosecution, should be a bar to the defendant's here taking proceedings of his own in the country where the property which was sought to be administered was situated (*f*).

*Lis alibi pendens.*

**1001.** Where there are actions in a colony and in England for the same object, so that, if the plaintiff obtains judgment in both, the defendant will have to pay the same demand twice, proceedings may be stayed in one of the actions; and the fact that the action

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(*s*) See p. 577, *ante*.

(*a*) *Bayley* v. *Edwards* (1792), 3 Swan. 703, *per* Lord CAMDEN, L.C., at p. 710. See title CONFLICT OF LAWS, Vol. VI., p. 281.

(*b*) *Firebrace* v. *Firebrace* (1878), 4 P. D. 63, *per* HANNEN, P., at p. 66.

(*c*) *Bank of Australasia* v. *Harding* (1850), 9 C. B. 661, *per* WILDE, C.J., at p. 686; *Bank of Australia* v. *Nias* (1851), 16 Q. B. 717, 735. See title JUDGMENTS AND ORDERS.

(*d*) *Smith* v. *Nicolls* (1839), 5 Bing. (N. C.) 208, 221.

(*e*) *Mutrie* v. *Binney* (1887), 35 Ch. D. 614, C. A.

(*f*) *Ibid.*, *per* NORTH, J., at p. 619, commenting on *Bayley* v. *Edwards* (1792), 3 Swan. 703.

in England is *in rem* and the action in the colony is personal makes no difference, the owners of the *res* being ultimately responsible (*g*).

Questions concerning real estate when decided.

**1002.** The validity of a will of land in any of the colonies is not triable in the English courts (*h*). But the provisions of a will relating to real estate situate where the common law of England prevails may be construed by an English court, provisions as to landed property situate where foreign law prevails being left to be construed by the *lex loci rei sitæ* (*i*).

Matrimonial questions.

**1003.** The High Court (Probate Division) will not entertain a suit for restitution of conjugal rights against a person domiciled in a colony and not present in this country (*k*). Nor will it, after a decree of nullity of marriage has been made by a colonial court, vary settlements, that being a jurisdiction that can be exercised only when the foundation of it is a decree of the court itself (*l*).

SUB-SECT. 2.—*Criminal.*

When charges of crime in colonies triable in England.

**1004.** Crimes are in their nature local; and the jurisdiction over a crime belongs to the country where the crime is committed (*m*).

**1005.** If any Governor of a colony, or other person in the public service of His Majesty, civil or military, out of Great Britain, is accused of committing any crime beyond the seas in the execution of, or under colour of executing, his office, the charge may be heard and determined in the High Court in England either upon the information of the Attorney-General or upon indictment (*n*); and any magistrate within whose jurisdiction the accused may be has authority to investigate the case and take the depositions and commit the accused for trial before the High Court (*o*).

SECT. 2.—*Appellate Jurisdiction.*

Jurisdiction of Judicial Committee of Privy Council.

**1006.** An appeal lies to His Majesty in Council from the courts of judicature in the East Indies and in the plantations, colonies, and other dominions of His Majesty abroad (*p*), including the Isle of Man and the Channel Islands. His Majesty is advised in the hearing of appeals by the Judicial Committee of the Privy Council (*q*), and their judgments take the form of reports to His Majesty of their opinions on the cases submitted to them (*r*).

(*g*) *The Lanarkshire* (1855), 2 Ecc. & Ad. 189. See title CONFLICT OF LAWS, Vol. VI., p. 298.

(*h*) *Pike* v. *Hoare* (1763), 2 Eden, 182.

(*i*) *Greenway* v. *Greenway* (1860), 2 De G. F. & J. 128, 138.

(*k*) *Firebrace* v. *Firebrace* (1878), 4 P. D. 63.

(*l*) *Moore* v. *Bull*, [1891] P. 279.

(*m*) *Rafael* v. *Verelst* (1776), 2 Wm. Bl. 1055, *per* DE GREY, C.J., at p. 1058; *Macleod* v. *A.-G. for New South Wales*, [1891] A. C. 455, P. C., *per curiam*, at p. 458.

(*n*) Stat. (1699) 11 & 12 Will. 3, c. 12; Criminal Jurisdiction Act, 1802 (42 Geo. 3, c. 85); *R.* v. *Picton* (1812), 30 State Tr. 225. Probably the statutes only apply to misdemeanours (*R.* v. *Shawe* (1816), 5 M. & S. 403).

(*o*) *R.* v. *Eyre* (1868), L. R. 3 Q. B. 487.

(*p*) Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), preamble; *Re Natal (Bishop)* (1864), 3 Moo. P. C. C. (N. S.) 115, 156. See also title COURTS, Vol. IX., p. 27, for the constitution and practice of the Judicial Committee. The Committee has no power to review the sentences of courts-martial (*Tilonko* v. *A.-G. of Natal*, [1907] A. C. 93, P. C.).

(*q*) The Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), ss. 1, 3.

(*r*) In ancient times the Privy Council was regularly summoned to assist the

SECT. 2. **Appellate Jurisdiction.**

Extent of jurisdiction in civil cases.

**1007.** Appeals in civil cases may be brought to His Majesty in Council from any court in any colony or possession abroad (*s*), subject to any rules of the court appealed from, *e.g.*, as to the time within which appeals must be brought, the amount which must be at stake (appealable value), giving security for costs etc. But where the leave of the court below has from any cause not been obtained, the Judicial Committee will in proper cases advise His Majesty to give special leave to appeal, *e.g.*, where the question is as to the construction of a colonial Act and of general interest in the colony (*t*), where the custody of children (*u*) or the liberty of the subject (*a*) is concerned, or with a view to prevent further litigation (*b*), in cases *in formâ pauperis* (*c*), or where the question at issue is one of great importance irrespective of money value, such as divorce (*d*). Appeals are not allowed merely on questions of costs, even though the costs in issue may amount to an appreciable sum, or to the sum which, when appeal was made, was alleged to be the amount involved (*e*). The Judicial Committee are not bound by previous decisions of their Board given *ex parte* (*f*).

Principles governing the Judicial Committee.

**1008.** The Judicial Committee refuse to listen to discussions on questions not raised on the pleadings and evidence, and not touched

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House of Lords or Court of Parliament in legal matters. The intermission of Parliaments under the Tudors caused a transfer of jurisdiction to the Privy Council, who discharged the functions which Parliament if sitting would have devolved on them as triers of Parliament. Under such circumstances the adjudication of appeals from foreign possessions was assumed by the Privy Council without objection. Appeals to the Sovereign from parts beyond the seas have been made since Henry VIII.'s time, and are justifiable on the ground of necessity, there being no other tribunal, and by virtue of the fundamental principle that it is the duty of the Crown to see justice administered to all its subjects. In 1724 it was solemnly decided in Chancery that to the King in Council alone lies an appeal from decrees in the plantations (*Fryer* v. *Barnard* (1724), 2 P. Wms. 261).

The jurisdiction of His Majesty in Council is founded essentially on prerogative, and cannot be taken away by general words in a colonial statute, not expressly mentioning the prerogative. See *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409; *Re Wi Matua's Will*, [1908] A. C. 448, P. C. It is not limited strictly to the functions of a court of justice, but partakes also of an administrative and executive character. It provides remedies in certain cases that do not fall within the jurisdiction of the ordinary courts of justice. See title COURTS, Vol. IX., p. 27.

(*s*) The Judicial Committee Act, 1844 (7 & 8 Vict. c. 69), s. 1. As to appeals from Barbados, St. Vincent, Grenada, and the Windward and Leeward Islands, see Orders in Council of June 28, 1909, [1909] W. N. pp. 299—302.

(*t*) *Brown* v. *McLaughan* (1870), L. R. 3 P. C. 458.

(*u*) *Camilleri* v. *Fleri* (1845), 5 Moo. P. C. C. 161.

(*a*) *Re McDermott* (1866), L. R. 1 P. C. 260.

(*b*) *Salisbury Gold Mining Co.* v. *Hathorn*, [1897] A. C. 268, P. C.

(*c*) *Ponamma* v. *Arumogam, Ex parte Ponamma*, [1902] A. C. 561, P. C.; *Quinlan* v. *Child, Ex parte Quinlan*, [1900] A. C. 496, P. C.; *Mitchell* v. *New Zealand Loan Co., Ex parte Mitchell*, [1904] A. C. 149, P. C., but not as a matter of course (*Quinlan* v. *Quinlan*, [1901] A. C. 612, P. C.; and see *Ex parte Walker*, [1903] A. C. 170, P. C.).

(*d*) *Le Meunier* v. *Le Meunier*, [1894] A. C. 283, P. C.

(*e*) *Attenborough* v. *Kemp* (1861), 14 Moo. P. C. C. 351; *Richards* v. *Birley* (1863), 2 Moo. P. C. (N. S.) 96; *Yeo* v. *Tatem, The Orient* (1871), L. R. 3 P. C. 696; *Wilson* v. *R.* (1866), L. R. 1 P. C. 405; *Credit Foncier of Mauritius, Ltd.* v. *Paturau & Co.* (1876), 35 L. T. 869, P. C.; *Rieken* v. *Yorke Peninsular Justices*, [1908] A. C. 454, P. C.

(*f*) *Tooth* v. *Power*, [1891] A. C. 284, 292, P. C.

by the court below (*g*). In dealing with evidence in the court below, or questions as to inferences to be drawn from such evidence, the Judicial Committee, as a general rule, consider that the court below before whom the witness appeared are better judges than themselves (*h*). And the conclusion of a jury on matters of fact should be upheld, although different from what the judges of the court of appeal might have come to (*i*). They will not grant leave to appeal in order to have an abstract point of law determined which did not arise in the case (*k*), nor will they give speculative opinions on hypothetical questions (*l*). Where a colonial legislative assembly possessing the right to determine questions as to the election of its own members, in complete independence of the Crown, delegated this right to a court of the colony by an Act which declared that the decision of such court should not be susceptible of appeal, the Judicial Committee refused leave to appeal from a decision of the court, although the Act did not mention the Crown or its prerogative (*m*). And where in a colony applications for lands as yet ungranted by the Crown had been referred by the legislature to a superior court, with directions that it should be guided in forming its decisions, which were to be final, by equity and good conscience only, and not be bound by strict rules of law and equity or by any technicalities or legal forms whatever, the Judicial Committee considered that such decisions could not be looked upon as judicial decisions admitting of appeal (*n*).

Appeals in criminal cases.

The Judicial Committee do not as a rule advise His Majesty to grant appeals in criminal cases except where questions of great and general importance, likely to occur often, are raised, and where the due and orderly administration of the law is shown to be interrupted, or diverted into a new course, which might create a precedent for the future, and where there are no other means of preventing these consequences (*o*).

Further powers.

His Majesty may refer to the Judicial Committee by a general Order in Council, continuing in force till rescinded, any matters whatever, besides appeals from the colonies and other dominions of the Crown abroad, which His Majesty may think fit; and the

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(*g*) *Grey* v. *Manitoba and North Western Rail. Co. of Canada*, [1897] A. C. 254, P. C. Compare *Victoria Corporation* v. *Patterson*, [1899] A. C. 615, 619, P. C.

(*h*) *Archambault* v. *Archambault*, [1902] A. C. 575, P. C.; *Witney* v. *Joyce* (1906), 95 L. T. 74, P. C.; *Tshingumuzi* v. *A.-G. of Natal*, [1908] A. C. 248, 250, P. C.

(*i*) *Toronto Rail.* v. *King*, [1908] A. C. 260, 270, P. C.; compare *Railways Commissioner* v. *Brown* (1887), 13 App. Cas. 133, 134, P. C.; *Phillips* v. *Martin* (1890), 15 App. Cas. 193, 194, P. C.; *Cox* v. *English, Scottish and Australian Bank*, [1905] A. C. 168, 170, P. C.

(*k*) *R.* v. *Louw, Ex parte A.-G. for the Cape of Good Hope*, [1904] A. C. 412, P. C.

(*l*) *A.-G. for Ontario* v. *Hamilton Street Rail.*, [1903] A. C. 524, P. C.

(*m*) *Théberge* v. *Laudry* (1876), 2 App. Cas. 102, P. C. But compare *Crown Grain Co., Ltd.* v. *Day*, [1908] A. C. 504.

(*n*) *Moses* v. *Parker, Ex parte Moses*, [1896] A. C. 245, P. C.

(*o*) *Esnouf* v. *A.-G. for Jersey* (1883), 8 App. Cas. 304, 308, P. C.; *Riel* v. *R.* (1885), 10 App. Cas. 675, P. C.; *Re Dillet* (1887), 12 App. Cas. 459, P. C.; *Falkland Islands Co.* v. *R.* (1863), 1 Moo. P. C. C. (N. S.) 299, 312; *Ex parte Deeming*, [1892] A. C. 422, P. C.; *Kops* v. *R.*, *Ex parte Kops*, [1894] A. C. 650, P. C.; *Ex parte Carew*, [1897] A. C. 719, P. C.; *Ex parte Aldred*, [1902] A. C. 81, P. C.; *R.* v. *Bertrand* (1867), L. R. 1 P. C. 520, 530. Compare

SECT. 2. Appellate Jurisdiction.

Judicial Committee is to consider them and to advise His Majesty thereon in the same way as appeals (*p*). Under this provision the Judicial Committee has considered and reported on such matters as the conduct and powers of colonial judges in their office (*q*), the jurisdiction of a colonial court to commit for contempt of court (*r*), the professional behaviour and the rights and privileges of practitioners in colonial courts (*s*), the power of the Governor of a colony to remit sentences for contempt of court (*t*), the power of the Crown to annex a colony to another (*a*), legislation in Jersey (*b*), the privileges of the Jersey Bar (*c*), the powers of the Executive in Guernsey (*d*), the officers of the Royal Court in Guernsey (*e*), the *status* and jurisdiction of Bishops of the Church of England in the colonies (*f*), and the determination by a legislative council of questions concerning a member of their body (*g*).

Appeals from Canada.

**1009.** In the Dominion of Canada there is a Supreme Court of Appeal (*h*), to which appeals may be brought from all the courts throughout the Dominion (as well as directly to His Majesty in Council), and whose judgment is in all cases (*i*) final and conclusive, saving any right His Majesty may be graciously pleased to exercise by virtue of his royal prerogative. The Judicial Committee have purposely abstained from laying down any rule as to the points which, by leave, an appellant may raise upon an appeal from the Supreme Court of Canada. That must depend on the special circumstances of each case (*j*). Leave will not, however, be granted when the case is not one of gravity, involving matter of public interest, or some important question of law, or affecting

*Re McDermott* (1866), L. R. 1 P. C. 260; and see *R.* v. *Murphy* (1868), L. R. 2 P. C. 535; *R.* v. *Coote* (1873), L. R. 4 P. C. 599; *Badger* v. *A.-G. for New Zealand* (1907), 97 L. T. 621; *Brown* v. *A.-G. for New Zealand*, [1898] A. C. 234, P. C.; *Re R.* v. *Marais, Ex parte Marais*, [1902] A. C. 51, P. C.; *Nelson* v. *R.*, [1902] A. C. 250, P. C.; *Tshingumuzi* v. *A.-G. of Natal*, [1908], A. C. 248, P. C.

(*p*) Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), s. 4; Appellate Jurisdiction Act, 1908 (8 Edw. 7, c. 51), s. 5.

(*q*) *Re Wells* (1840), 3 Moo. P. C. C. 216; *Smith* v. *Sierra Leone Justices* (1841), *ibid.* 361; *Island of Grenada* (*Representatives*) v. *Sanderson* (1847), 6 Moo. P. C. C. 38; *Montague* v. *Van Diemen's Land* (*Lieut.-Governor*) (1848), *ibid.* 489; *Cloete* v. *R.* (1854), 8 Moo. P. C. C. 485; *Re Ramsay* (1870), L. R. 3 P. C. 427.

(*r*) *McDermott* v. *British Guiana* (*Judges*) (1868), L. R. 2 P. C. 341.

(*s*) *Re Monckton* (1837), 1 Moo. P. C. C. 455; *Smith* v. *Sierra Leone Justices* (1848), 7 Moo. P. C. C. 174; *Rainy* v. *Sierra Leone Justices* (1853), 8 Moo. P. C. C. 47; *Emerson* v. *Newfoundland* (*Judges*) (1852-4), 8 Moo. P. C. C. 157; *Re Wallace* (1866), L. R. 1 P. C. 283; *Re Pollard* (1868), L. R. 2 P. C. 106.

(*t*) *Re a Special Reference from the Bahama Islands*, [1893] A. C. 138, P. C.

(*a*) *Re Island of Cape Breton* (1846), 5 Moo. P. C. C. 259.

(*b*) *Re States of Jersey* (1853), 9 Moo. P. C. C. 185; *Re Same* (1862), 15 Moo. P. C. C. 195; *Re Same, Re Gibaut* (1858), 11 Moo. P. C. C. 320.

(*c*) *The Jersey Bar* (1859), 13 Moo. P. C. C. 263.

(*d*) *Re Royal Courts of Guernsey* (*Bailiff and Jurats*) (1844), 5 Moo. P. C. C. 49.

(*e*) *Re States of Guernsey* (1861), 14 Moo. P. C. C. 368.

(*f*) *Re Natal* (*Bishop*) (1864), 3 Moo. P. C. C. (N. S.) 115.

(*g*) *A.-G. of Queensland* v. *Gibbon* (1887), 12 App. Cas. 442, P. C.

(*h*) Established under authority of the British North America Act, 1867 (30 & 31 Vict. c. 3), s. 101, by the Supreme and Exchequer Court Act, 1875 (38 Vict. c. 11), re-enacted by Revised Statutes of Canada, 1906, c. 139.

(*i*) Revised Statutes of Canada, 1906, c. 139, s. 59.

(*j*) *St. John's Corporation* v. *Central Vermont Rail. Co.* (1889), 14 App. Cas. 590, P. C., at p. 595.

property of considerable amount (*a*). A case, however, may be of a substantial character, may involve matters of general public interest, and may raise important questions of law; and yet the judgment from which leave to appeal is sought may appear plainly right, or at least be unattended with sufficient doubt to justify their Lordships in advising His Majesty to grant leave to appeal (*b*). And if a suitor elects to go to the Supreme Court instead of to His Majesty in Council direct, the Judicial Committee will not give him assistance except under special circumstances. It is different when a suitor is taken before the Supreme Court because he cannot help it (*c*).

Appeals from Australia.

**1010.** In the Commonwealth of Australia the High Court is a court of appeal from—

(1) Any justice or justices exercising the original jurisdiction of the High Court;

(2) Any other federal court or court exercising federal jurisdiction, or the Supreme Court of any State, or any other court of any State from which at the establishment of the Commonwealth an appeal lay to His Majesty in Council;

(3) The Inter-State Commission, as to questions of law only.

In all such cases its judgment is final and conclusive (*d*). No appeal lies to His Majesty in Council from the High Court on constitutional questions unless the High Court certifies that the question ought to be determined by His Majesty in Council (*e*). With this exception, His Majesty's prerogative to grant special leave is unimpaired.

Principles on which special leave to appeal is granted.

**1011.** Applications for special leave to appeal from the High Court will be treated by the Judicial Committee in the same manner as applications for special leave to appeal from the Supreme Court of Canada (*f*). Accordingly in a case where there was no question of law upon which the judgment below could be objected to, but a mere question of private right, which, though of a substantial character, involved no question of public importance, the Judicial Committee refused to recommend His Majesty to grant leave to appeal from the High Court (*g*). And in a case where the High Court had refused to follow the decision of the Judicial Committee, but the Commonwealth Parliament had passed an Act affirming that decision, the Judicial Committee refused special

(*a*) *Prince* v. *Gagnon* (1882), 8 App. Cas. 103, 105, P. C.; *Ewing* v. *Dominion Bank*, [1904] A. C. 806, P. C.

(*b*) *La Cité de Montréal* v. *Les Ecclésiastiques du Seminaire de St. Sulpice de Montréal* (1889), 14 App. Cas. 660, 662, P. C., followed in *Townsend* v. *Cox*, [1907] A. C. 514, P. C.

(*c*) *Clergue* v. *Murray, Ex parte Clergue*, [1903] A. C. 521, 523, P. C.; followed in *Canadian Pacific Rail.* v. *Blain*, [1904] A. C. 453, P. C.

(*d*) Commonwealth of Australia Constitution Act, (63 & 64 Vict. c. 12), schedule, art. 73.

(*e*) *Ibid.*, art. 74. See also *A.-G. for New South Wales* v. *Collector of Customs for New South Wales*, [1909] A. C. 345, P. C.

(*f*) *Daily Telegraph Newspaper Co.* v. *McLaughlin*, [1904] A. C. 776, P. C. See p. 582, *ante*.

(*g*) *Wilfley Ore Concentrator Syndicate, Ltd.* v. *N. Guthridge, Ltd.*, [1906] A. C. 548, P. C.

SECT. 2. Appellate Jurisdiction.

leave to appeal, the amount at stake being small, and the controversy being closed (*h*). And, as in cases from the Supreme Court of Canada, where the parties asking for special leave to appeal to His Majesty in Council think fit to appeal to the High Court instead of coming direct to the Judicial Committee from the State court, as they can if they choose (*i*), and the judgment appealed from is affirmed in the High Court, their Lordships will not as a rule entertain a petition for special leave to appeal. Not that they disclaim their power to do so, but a very special case must be made to induce them to exercise their power (*k*).

Appeals from State courts.

**1012.** On the assumption that the right of appeal to His Majesty in Council from the Supreme Court of Queensland had been taken away by the Judiciary Act of the Commonwealth (*l*), it was decided by the Judicial Committee that that Act was not retrospective, and therefore did not take away a right of appeal to His Majesty in Council vested in the appellants at the date of the passing of the Act (*m*). But no authority is given to the Commonwealth Parliament under the Commonwealth Constitution Act (*n*) to take away the right of appeal to His Majesty in Council from a judgment of a State court as to the State's power to impose taxation in respect of his salary upon an officer of the Commonwealth resident in the State and receiving his salary therein (*o*), nor apparently from any other judgment of a State court (*p*).

Appeals from South Africa.

**1013.** In the Union of South Africa there is no appeal from the Supreme Court or from any division thereof to the King in Council; saving, however, any right which the King in Council may be pleased to exercise to grant special leave to appeal from the Appellate Division of the Court to His Majesty in Council. Nor is any right of appeal to His Majesty in Council from any judgment of the Appellate Division of the Supreme Court under or in virtue of the Colonial Courts of Admiralty Act, 1890 (*q*), affected (*r*).

# Part V.—India.

## SECT. 1.—*Definitions.*

Constitutional position of India.

**1014.** From a strict constitutional point of view, India may be said to rank as a Crown colony, for the Crown retains complete control over its administration, and all the members of its legislature

(*h*) *New South Wales Taxation Commissioners* v. *Baxter*, [1908] A. C. 214, P. C.
(*i*) See *Peninsular and Oriental Steam Navigation Co.* v. *Kingston*, [1903] A. C. 471, P. C.
(*k*) *Victorian Railway Commissioners* v. *Brown*, *Ex parte Victorian Railway Commissioners*, [1906] A. C. 381, 382, P. C.
(*l*) Judiciary Act, 1903 (No. 6 of 1903), s. 39 (2).
(*m*) *Colonial Sugar Refining Co.* v. *Irving*, [1905] A. C. 369, P. C.
(*n*) Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12).
(*o*) *Webb* v. *Outrim*, [1907] A. C. 81, P. C.
(*p*) *Ibid.*, p. 92.
(*q*) 53 & 54 Vict. c. 27.
(*r*) South Africa Act, 1909 (9 Edw. 7, c. 9), s. 106.

are nominated by the executive. It occupies, however, a position apart from the Crown colonies proper because of its extent and its complex constitution. This constitution has, for historical reasons, been mainly framed by means of Acts of Parliament, and not through the prerogative action of the Crown.

SUB-SECT. 1.—*India and British India.*

Extent of India.

**1015.** India in a political sense (*a*) is both larger and smaller than the geographical area of that name. It does not include the French and Portuguese possessions within the peninsula, nor the adjacent island of Ceylon. It does include Burma on the further side of the Bay of Bengal, the Andaman and Nicobar Islands lying in that bay, the Laccadive Islands (but not the Maldives) off the western coast, and the whole of the westward extension of the mainland called Baluchistan; also the settlement of Aden in Arabia and the island of Perim at the mouth of the Red Sea (*b*).

The word "India" also includes dependent States and other areas which are not properly part of the dominions of the Crown.

British India.

**1016.** British India, on the other hand, consists of that area of India which forms part of the dominions of the Crown. So far as regards every Act of Parliament passed since 1889, "British India" means (*c*) all territories and places within His Majesty's dominions which are for the time being governed by His Majesty through the Governor-General of India, or through any governor or other officer subordinate to the Governor-General; and "India" means (*d*) British India together with any territories of any native prince or chief under the suzerainty of His Majesty exercised through the Governor-General of India, or through any governor or other officer subordinate to the Governor-General (*e*).

SUB-SECT. 2.—*Native States.*

Native States.

**1017.** The Native or Feudatory States, from the constitutional point of view, lie entirely outside British India. They vary extremely in origin, in history, in area, and in political power; but all alike possess certain attributes of sovereignty, and all alike are under the suzerainty of the Crown. Their number is approximately 675, though some of these consist of no more than a single village. Their total area is about 824,000 square miles, and their total population about 68,000,000 souls.

It is probably impossible to attempt the definition of a Native

(*a*) The old style "the East Indies" is still frequently used in official papers laid before Parliament as synonymous with "India" in this sense.

(*b*) Aden and its dependencies, which are administered as part of Bombay, are defined in s. 2 of the Aden Laws Regulation (II. of 1891).

(*c*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (4); (Indian) General Clauses Act, 1897 (X. of 1897), s. 3 (7).

(*d*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (5); (Indian) General Clauses Act, 1897 (X. of 1897), s. 3 (27).

(*e*) These definitions seem to be defective inasmuch as they fail to take into account "administered areas" and "tribal territories"; see p. 587, *post*. The Indian (Foreign Jurisdiction) Order in Council, 1902, expressly applies to "territories adjacent to India."

SECT. 1. Definitions.

State, or even to ascertain the precise status of its ruler, if there be one. The accepted test is that the inhabitants are not British subjects properly so called, that they are not amenable to ordinary British jurisdiction, and that they do not pay revenue (*f*).

Status.

**1018.** The precise status of any Native State, and its relations with the British Government, are determined only in part by the treaties that may have been entered into with its chief, or by the *sanads* (or patents) that may have been granted to him. In addition to such documentary evidences, there exists a general body of principles and rules which express the paramount authority of the Crown and at the same time limit the sovereignty of every ruling chief; and, from the nature of the case, the final interpretation of these principles and rules rests with the British Government (*g*).

Subordinate sovereignty.

**1019.** Only certain attributes of sovereignty (*h*) belong to the Native States. For example, they possess no international character, either as against foreign Powers or as among themselves. Their subordination to the British Crown is conveniently expressed by the vague term "suzerainty," which is employed in recent Acts of Parliament (*i*) in substitution for the less accurate term "alliance" used in earlier statutes (*k*).

On the other hand, the larger States, *e.g.*, Hyderabad and Baroda, possess certain of the recognised powers of sovereignty. The chiefs conduct every department of internal administration in their own name, and without interference except in case of gross misgovernment. Supreme authority—executive, legislative, and judicial—is vested in their persons, which are not subject to the jurisdiction of any British court, civil or criminal. They exercise over their own subjects the powers of life and death, of levying taxes, of enlisting troops, of coining money, of issuing postage stamps.

Certain native rulers have consented to restrict or abandon some of these powers, out of consideration for the common interests of the Empire; and in all cases the paramount power exercises supervision through a resident or political agent (*l*), whose advice in the last resort has the force of a command.

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(*f*) See *Empress* v. *Keshub Mohajun* (1882), Indian Law Reports, 8 Calcutta, 985, and *Re Bichitranund* v. *Bhugbut Perai* (1889), Indian Law Reports, 16 Calcutta, 667; also the minute of Sir H. S. Maine printed in his "Life and Speeches," pp. 320—325. The status of Kathiawar was considered by the Privy Council in *Hemchand Devchand* v. *Azam Sakarlal Chhotamlal* (1905), L. R. 33 Ind. App. 1. For the cession of British territory to a Native State, see *Damodhar Gordhan* v. *Deoram Kanji* (1876), L. R. 3 Ind. App. 102.

(*g*) See Sir C. U. Aitchison, Treaties etc. relating to India, mentioned in note (*q*) on p. 587, *post*.

(*h*) "Life and Speeches of Sir H. S. Maine," p. 322.

(*i*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12.

(*k*) Ruling chiefs are not addressed as "Royal," but they bear the title of "His Highness," and rank among one another according to the number of guns in the salute awarded to them by the paramount power.

(*l*) "Political agent" is defined in the General Clauses Act, 1897 (X. of 1897), s. 3 (40). From the judicial jurisdiction of a political agent the ultimate appeal is to the Governor-General in Council, or to the Governor in Council, as the case may be (*Hemchand Devchand* v. *Azam Sakarlal Chhotamlal*, *supra*.

SECT. 1. Definitions.

Occasions have arisen when it has been found necessary to arraign chiefs for heinous crimes before a specially constituted tribunal (*m*), or to depose them for persistent misconduct and disloyalty (*n*), or even to break up the integrity of a Native State (*o*). But since the pacification that followed the Mutiny of 1857, the theory of annexation by "lapse" has been disavowed, succession by adoption in default of natural heirs has been universally granted, no territory has been compulsorily transferred from native to British rule, and the status of a ruling chief is secure.

Power of chief.

**1020.** While every Native State possesses some mark of independence, in that it is not subject to ordinary British law, the degree of authority actually exercised by the ruling chief varies very considerably. The minimum is represented by the right of collecting land revenue, with which is usually associated some measure of civil and criminal jurisdiction. But in the smaller States the judicial power of the chiefs is strictly limited to petty offences, all serious crimes being reserved for the decision of British political agents, whose jurisdiction is derived from the inherent prerogative of the paramount power. Sentences of death, or imprisonment for life, require confirmation from political agents in all States except the very largest. Criminal jurisdiction over European British subjects is everywhere reserved for a British High Court.

In all Native States certain areas—such as residencies, military cantonments, and railway lines (*p*)—are treated as detached portions of British territory, and excluded altogether from the jurisdiction of the chiefs (*q*).

SUB-SECT. 3.—*Administered Areas and Tribal Territories.*

Administered areas.

**1021.** Apart from Native States proper, two other classes of territory which are outside British India require to be distinguished. There exist, on the one hand, certain considerable areas that have been acquired by permanent lease or some similar arrangement, under which the sovereignty has not passed to the Crown, but every function of administration is exercised by the Governor-General in

(*m*) The Maharaja of Panna, in Central India, was tried and found guilty of privity to murder in 1902. In this case it was held by the Privy Council that the commission appointed by the Governor-General, which convicted the Maharaja, was not in any sense a court from which an appeal would lie (*Maharajah Madhava Singh* v. *Secretary of State for India in Council* (1904), L. R. 31 Ind. App. 239).

(*n*) The Gaekwar of Baroda was deposed in 1875.

(*o*) The State of Jhalawar, in Rajputana, was dismembered in 1897.

(*p*) The extent of this jurisdiction as regards railways was reviewed by the Privy Council in the case of *Muhammad Yusuf-ud-din* v. *Queen-Empress* (1897), L. R. 24 Ind. App. 137.

(*q*) An example of the restrictions of sovereignty imposed on a Native State may be found in the Instrument of Transfer by which Mysore was restored to its Hindu Raja in 1881. See also Sir C. U. Aitchison, Treaties, Engagements, and Sanads relating to India and Neighbouring Countries, published by authority of the Foreign Department of the Government of India, 11 volumes (Calcutta, 1893); Sir C. L. Tupper, Our Indian Protectorate (1892); Sir W. Lee-Warner, The Protected Princes of India (1894).

SECT. 1. Definitions.

Council in virtue of the authority so transferred (*a*). Berar is an example of such "administered areas" (*b*).

Tribal territories.

**1022.** There exist also certain "tribal territories" on both the north-western and north-eastern frontiers, where the inhabitants do not recognise any prince or chief, but which are no less certainly under the suzerainty of the Crown (*c*).

SUB-SECT. 4.—*Natives of India.*

Status of natives.

**1023.** The political status of natives of India gives rise to some curious questions that are not easy of determination. Before the government had passed from the Company to the Crown it was a matter of doubt whether natives of India (except in the island of Bombay, which had once been a Crown possession) were "British subjects," as that term was occasionally used in Acts of Parliament relating to India (*d*). Since the Government of India Act, 1858 (*e*), this doubt can no longer exist, so far at least as natives of British India are concerned; and it is matter of common knowledge that two of them have been elected members of Parliament. But the old doubt still remains with regard to the subjects of Native States (*f*). No distinction of race, colour, or religion affects the political status of a British subject in the United Kingdom, though British colonies with representative government may have decided to enact otherwise. The same rule, so far as regards eligibility for public office, was applied to India by statute as early as 1833 (*g*).

It should, however, be stated that, under regulations made by the Secretary of State for War, candidates for commissions in the British Army must be "of pure European descent"; and a similar regulation is adopted by the Admiralty for cadetships in the Royal Navy. As to the Civil Service of India, it is expressly provided by statute (*h*) that all "natural born subjects" of the Crown may be admitted for examination, thus including natives of India, but apparently not the subjects of Native States. The regulations on this point for other services filled up by recruitment in England

(*a*) The case of Cyprus, under the Colonial Office, may be compared.

(*b*) See Parliamentary Paper, East India (Hyderabad), agreement respecting the Hyderabad Assigned Districts, 1902, Cd. 1321.

(*c*) In the map prefixed to the "Imperial Gazetteer of India" (published under the authority of His Majesty's Secretary of State for India in Council), "permanently administered territories" are coloured pink, as opposed to red for British India; "tribal territories" are not distinguished from Native States, but both alike are coloured yellow; Nepal and Bhutan, as enjoying a larger measure of independence than other Native States, are coloured green.

(*d*) See Fifth Appendix to Report of Select Committee of House of Commons in 1831, pp. 1114, 1142, 1146, *et seq.*, 1168, 1178, 1229.

(*e*) 21 & 22 Vict. c. 106.

(*f*) Ilbert, Government of India, p. 392, is of opinion that, for international purposes, they are in the same position as British subjects, and doubts whether they would be capable of obtaining a certificate of naturalisation as aliens.

(*g*) Government of India Act, 1833 (3 & 4 Will. 4, c. 85), s. 87: "No native of the said territories, nor any natural born subject of His Majesty resident therein, shall, by reason only of his religion, place of birth, descent, colour, or any of them, be disabled from holding any place, office, or employment under the said Company."

(*h*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 32.

vary. For the Indian Medical Service, candidates must be natural born subjects of European or East Indian descent (*i*); for the Indian Police, they must be British subjects of European descent (*k*); for the Forest Service, they must be natural-born British subjects (*l*); for the Public Works Department, one-tenth may be natives of India who are British subjects (*m*).

With regard to appointments made in India, the only statutory qualification of "native of India" is to be found in the enactment giving power to appoint such to offices otherwise reserved for the Civil Service (*n*). For that purpose the expression is interpreted to include "any person born and domiciled in British India, of parents habitually resident in British India, and not established there for temporary purposes only." This definition is, of course, exclusive of race; it has been construed to include persons born or domiciled in a Native State.

As explained later (*o*), European British subjects, as defined in the Criminal Procedure Code, enjoy certain privileges in criminal trials; as also do other Europeans and Americans to a less extent. Finally it may be mentioned, that the Governor-General in Council has a statutory power (*p*) to authorise a High Court to exercise jurisdiction over "Christian subjects" of the Crown resident in Native States.

## SECT. 2.—*The Government in England.*

### SUB-SECT. 1.—*The Crown.*

East India Company.

**1024.** Down to the year 1858 India was governed by the East India Company, which had conquered the country with its own resources, and had concluded treaties in its own name with the native powers (*q*).

Transfer to Crown.

The Act for the Better Government of India, 1858 (*r*), transferred the government from the Company to the Crown, and declared that India should henceforth be governed by and in the name of the Crown. It also created the office of a new Secretary of State, to exercise all the powers formerly exercised either by the Directors of the Company or by the Board of Control, and established a Council of India. Finally, by a statute passed in 1876 (*s*),

(*i*) India Office List (1909), p. 242.
(*k*) *Ibid.*, 214.
(*l*) *Ibid.*, 229.
(*m*) *Ibid.*, 222.
(*n*) Government of India Act, 1870 (33 & 34 Vict. c. 3), s. 6.
(*o*) Code of Criminal Procedure (Act V. of 1898), s. 4 (1) (i). See p. 611, *post*.
(*p*) Indian High Courts Act, 1865 (28 & 29 Vict. c. 15), s. 3.
(*q*) According to constitutional theory, all acquisitions of territory made by British subjects vest in the Crown; and the subordinate status of the Company, as trustee for the Crown, was recognised from an early date in Acts of Parliament. Moreover, since the passing of the East India Company Act, 1784 (24 Geo. 3, sess. 2, c. 25), the ultimate control over the government of India was exercised by a minister of the Crown (the President of the Board of Control), the Directors of the Company being bound to issue in their own name all orders received from him. This anomalous system of "double government" did not survive the Mutiny.
(*r*) Government of India Act, 1858 (21 & 22 Vict. c. 106).
(*s*) Royal Titles Act, 1876 (39 & 40 Vict. c. 10).

SECT. 2. The Government in England.

the Sovereign was enabled to make an addition to the royal style and title as Empress (or Emperor) of India.

SUB-SECT. 2.—*Parliament.*

Authority of Parliament.

**1025.** The authority of Parliament over India is for the most part indirect. It has created the constitution of the Government, both at home and in India; and it alone has the power of amending that constitution. Its consent is necessary for the borrowing of money in the United Kingdom by the Secretary of State. Its power to legislate for India is supreme (*t*), but is rarely exercised. The revenues of India are not under its control, but they must not be applied to defraying the expenses of military operations beyond the frontier without the consent of both Houses, except for preventing or repelling actual invasion or under other sudden or urgent necessity (*a*). The salary of the Secretary of State is not included in the annual estimates voted by the House of Commons. It is, however, provided that detailed accounts of receipts and disbursements, both in India and in England, shall be laid before Parliament annually, together with a report exhibiting the moral and material progress of the country (*b*). The Home accounts are further subject to examination by an independent auditor, whose report must likewise be presented to Parliament every year (*c*).

In accordance with constitutional practice, the Secretary of State, as a Minister of the Crown, is responsible to criticism, and, if occasion should arise, to censure, in either House of Parliament; and this responsibility is shared with the Cabinet, of which he is always a member (*d*).

The earliest direct interposition of Parliament in the government of India, as opposed to the affairs of the Company at home, is contained in the East India Company Act, 1772 (*e*), which nominated Warren Hastings to be the first Governor-General and also his four colleagues as councillors. The strongest expression of its supreme authority is to be found in the Government of India Act, 1833 (*f*), which, while conferring new legislative powers upon the Governor-General in Council, expressly declared that "a full, complete, and

(*t*) Its powers were expressly reserved by the Government of India Act, 1833 (3 & 4 Will. 4, c. 85), s. 51, which established the first local legislature for India.

(*a*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 55. The precise meaning of this provision has been repeatedly discussed in Parliament. See Parliamentary Debates, 3rd series, Vol. 151, July 19, 23, 1858; Parliamentary Debates, 3rd series, Vol. 240, May 20, 21, 23, 1878; Parliamentary Debates, 3rd series, Vol. 243, December 16, 17, 1878; Parliamentary Debates, 3rd series, Vols. 272, 273, July 27, 31, 1878; Parliamentary Debates, 3rd series, Vol. 295, March 5, 9, 16, 1885; Parliamentary Debates, 3rd series, Vol. 302, January 25, 1886.

(*b*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 53. The debate on this financial statement is sometimes called the discussion of the Indian Budget.

(*c*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 52.

(*d*) "Imperial Gazetteer of India," Vol. IV., p. 40.

(*e*) 13 Geo. 3, c. 63.

(*f*) 3 & 4 Will. 4, c. 85, s. 51.

constantly existing right and power is intended to be reserved to Parliament to control, supersede, or prevent all proceedings and acts whatsoever made by the Governor-General in Council, and in all respects to legislate for the said territories and all the inhabitants thereof in as full and ample a manner as if this Act had not been passed"; and further required all laws and regulations made by the Governor-General in Council to be laid before both Houses of Parliament. Under the statutes constituting the existing Indian legislatures their enactments are not required to be laid before Parliament; but they are prohibited from passing any law "which may affect the authority of Parliament" (*g*). All regulations for admission to the Civil Service of India, made by the Secretary of State with the advice of the Civil Service Commissioners, must be forthwith laid before Parliament (*h*). By the statute authorising the formation of what is called the "Statutory Civil Service," it is provided that every resolution of the Governor-General in Council defining the qualification of "natives of India" shall not have force until it has been laid for thirty days before both Houses of Parliament (*i*).

Finally, the Indian Councils Act, 1909 (*k*), requires all regulations made by the Governor-General in Council concerning the reformed legislative councils to be laid before Parliament, and further provides that an executive council shall not be established for any other Province than Bengal if either House of Parliament present an address to the contrary.

SUB-SECT. 3.—*The Secretary of State.*

The Secretary of State.

**1026.** The powers and duties of the Secretary of State (popularly called the Secretary of State for India) are derived partly from the Act of 1858 (*l*) and partly also from his constitutional position as adviser of the Crown (*m*). He is appointed by the delivery to him of the seals of office. Since in theory the office of Secretary of State forms a unit, though there are five officers, each of the Secretaries of State is capable of performing the duties of any of the others.

The conduct of all business in the United Kingdom in relation to the government of India is subject to the direction of the Secretary of State, and all official communications and orders must be signed by him. It is on his advice that all appointments by the Crown are made, and he has the power of dismissal. As inheriting the powers of the Court of Directors and of the Board of Control, he has authority to superintend, direct, and control all acts, operations, and concerns which in any wise relate to or concern the government or revenues of India, and all grants of salaries, gratuities, and allowances, and all other payments and charges whatever out of or on the revenues of India (*n*). In many matters,

(*g*) Indian Councils Act, 1861 (24 & 25 Vict. c. 67), s. 22.
(*h*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 32.
(*i*) Government of India Act, 1870 (33 & 34 Vict. c. 3), s. 6.
(*k*) 9 Edw. 7, c. 4.
(*l*) Government of India Act, 1858 (21 & 22 Vict. c. 106).
(*m*) "Imperial Gazetteer of India," Vol. IV., pp. 36—38.
(*n*) Government of India Act, 1833 (3 & 4 Will. 4, c. 85), s. 25.

SECT. 2. The Government in England.

however, he is required to exercise his duties "in Council"; and in a few important matters the concurrence of a majority of the members of the Council is necessary (*o*).

SUB-SECT. 4.—*The Council of India.*

Council of India.

**1027.** The constitution of the Council of India, as originally established in 1858 (*p*), has been considerably modified by subsequent legislation (*q*). It now consists of not more than fifteen and not less than ten members. Unless nine of the existing members have served or resided in India for at least ten years and have not left India more than five years before their appointment, the person appointed to fill the vacancy must be so qualified. The term of office is henceforth seven years, and the salary is £1,000.

A member of Council is not capable of sitting in Parliament. The office is held for the allotted term during good behaviour, subject to removal by the Crown on an address from both Houses of Parliament. Appointments are made by the Secretary of State, not by the Crown. Quite recently a Hindu and a Mahomedan have been appointed.

Position of Council.

**1028.** The Council of India is an advisory body, representing the local and business experience of the former Court of Directors. But its statutory functions are not confined to advice. It has the duty imposed upon it of conducting, under the direction of the Secretary of State, the business transacted in the United Kingdom in relation to the government of India, and the correspondence with India (*r*). It must meet at least once in every week, and five members constitute a quorum (*s*).

All communications to and from India must either be submitted to a meeting of the Council, or else must be placed on the Council table for seven days before being issued (*t*); but this rule does not apply to two classes of cases, termed "secret" and "urgent" (*a*). The former class consists of communications relating to war and peace or to Native States which, under the Act of 1793 (*b*), were referred to a committee of secrecy of the former Court of Directors; the latter class includes any communication which the Secretary of State may consider to be urgent, but he is required to inform the Council of his reasons.

Meetings.

**1029.** At meetings of the Council the Secretary of State presides, and has a casting vote (*c*). In his absence, the vice-president or

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(*o*) See p. 593, *post*.
(*p*) Government of India Act, 1858 (21 & 22 Vict. c. 106), ss. 7, 10, 11, 12, 13, 19, 20, 21, 22, 23.
(*q*) Government of India Act, 1869 (32 & 33 Vict. c. 97), ss. 1, 2, 3, 6, 7; Council of India Act, 1876 (39 & 40 Vict. c. 7); Council of India Reduction Act, 1889 (52 & 53 Vict. c. 63); and Council of India Act, 1907 (7 Edw. 7, c. 35).
(*r*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 19.
(*s*) *Ibid.*, s. 22.
(*t*) *Ibid.*, s. 24.
(*a*) *Ibid.*, ss. 26, 27.
(*b*) East India Company Act, 1793 (33 Geo. 3. c. 52), ss. 19, 20.
(*c*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 21.

some other member presides; but all acts done in council in his absence require his approval in writing. For certain specified matters, of which the making of any grant or appropriation of the revenues of India is the most important, the concurrence of a majority of members of the Council present is required (*d*); but in all other cases the determination of the Secretary of State is final, though dissentient members are entitled to have their opinion and reasons recorded (*e*).

Committees.

For the more convenient transaction of business, the Secretary of State is empowered to divide the Council into committees (*f*), which are at present seven in number, entitled Finance, Military, Political and Secret, Revenue and Statistics, Judicial and Public, Public Works, and Stores.

SUB-SECT. 5.—*The India Office Staff.*

India Office staff.

**1030.** The establishment of the Secretary of State, commonly known as the staff of the India Office, is likewise regulated by the Act of 1858 (*g*). The number and the salaries of the staff are fixed by Orders in Council, which must be laid before Parliament.

The Secretary of State, in virtue of his office, has two under-secretaries, one permanent and the other parliamentary, to whom he delegates some of his minor duties. For each department of business, corresponding to the committees into which the Council is divided, there is a secretary and assistant secretary, with a staff of clerks. The store department is under a director-general.

Other departments are those of the accountant-general, the registrar and superintendent of records, and the director of funds. There is a medical board for the examination of officers of the Indian services, a legal adviser and solicitor to the Secretary of State, and a librarian.

Appointments to the establishment are made by the Secretary of State in Council; but "junior situations" must be filled in accordance with the general regulations governing admission to the Home Civil Service.

The position of the auditor is peculiar. His appointment by the Crown must be countersigned by the Chancellor of the Exchequer; and he nominates his own assistants. But the salary of the auditor and his assistants, as well as the salaries, pensions, and other charges of the entire staff of the India Office, are defrayed from the revenues of India (*h*).

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(*d*) The precise meaning of this enactment, Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 41, was discussed in the House of Lords on April 29, 1869 (Parliamentary Debates, 3rd series, Vol. 195, pp. 1821-1846), when Lord CAIRNS expressed a different view to that maintained by the LORD CHANCELLOR (Lord Hatherley).

(*e*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 23.

(*f*) *Ibid.*, s. 20.

(*g*) *Ibid.*, ss. 15, 16, 18.

(*h*) "Imperial Gazetteer of India," Vol. IV., p. 39.

SECT. 3. The Government in India.

## SECT. 3.—*The Government in India.*

### SUB-SECT. 1.—*Executive.*

Executive Government.

**1031.** The constitution of the Government of India, as exercised in India, is ultimately based upon the inherent authority of the Crown, as expressed and regulated, first by charters from Elizabeth onwards, and since by a series of Acts of Parliament. It appears also (*i*) that some of its powers, especially those relating to land and to the Native States, have been inherited, through the East India Company, from the defunct Mogul empire.

#### (i.) *The Governor-General.*

The Governor-General.

**1032.** The Governor-General is appointed by the Crown, by warrant under the Royal Sign Manual (*k*), on the advice of the Prime Minister. As representative of the Sovereign, he bears also the title of Viceroy, which is habitually used in India, though not authorised by any statute (*l*).

The term of office of the Governor-General is, by custom, five years; but if he should depart from India intending to return to Europe his office thereupon becomes vacant (*m*). There are special provisions for filling the office in the event of a vacancy (*n*).

#### (ii.) *The Governor-General in Council.*

The Governor-General in Council.

**1033.** A distinction must be drawn between the office of Governor-General, which is personal, and the powers and duties of the Governor-General and his councillors, collectively styled "the Governor-General in Council." By statute (*o*) the superintendence, direction, and control of the entire government of India, both civil and military, is vested in the Governor-General in Council, subject to any instructions that may be received from the Secretary of State. This collective body is frequently called "the Government of India" (*p*), and sometimes "the Supreme Government," as opposed to the provincial administrations.

The executive council.

**1034.** In addition to the Governor-General, the executive council consists of six members (styled "ordinary" members), appointed

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(*i*) Sir C. P. Ilbert, "The Government of India," pp. 1, 179.

(*k*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 29. The warrant of appointment is printed in Ilbert, The Government of India, 1898 edition, pp. 574—576.

(*l*) This title was first employed in the Royal Proclamation of 1858, which announced in India the assumption of the government by the Crown, and referred to Lord Canning as the "first Viceroy and Governor-General."

(*m*) East India Company Act, 1793 (33 Geo. 3, c. 52), s. 37; Government of India Act, 1833 (3 & 4 Will. 4, c. 85), s. 79. When the Duke of Connaught wished to visit England in the Jubilee year during his term of office as commander-in-chief in Bombay, a special Act of Parliament was required (stat. (1887) 50 Vict. sess. 2, c. 10).

(*n*) Government of India Act, 1833 (3 & 4 Will. 4, c. 85), s. 62; Indian Councils Act, 1861 (24 & 25 Vict. c. 67), ss. 50, 51.

(*o*) East India Company Act, 1772 (13 Geo. 3, c. 63), s. 9; Government of India Act, 1833 (3 & 4 Will. 4, c. 85), s. 39.

(*p*) "Government of India" is defined in the General Clauses Act, 1897 (X. of 1897), s. 3 (22).

by the Crown, of whom three must have served in India for at least ten years, and one must be either a barrister or advocate of five years' standing (*q*). A native barrister was first appointed an "ordinary" member of council in 1909. The Commander-in-Chief, who is appointed to his office on the advice of the Secretary of State for War, may be, and in practice always is, appointed by the Secretary of State for India to be an extraordinary member (*r*); and if the council should happen to meet, as is rarely the case, within the Presidencies of Madras or Bombay, the governor of that Presidency is also an extraordinary member (*s*).

The term of office of a member of council is, by custom, five years. Leave of absence under medical certificate may be granted for not more than six months (*t*). Temporary vacancies may be filled up by the Governor-General in Council (*a*).

Meetings and proceedings.

**1035.** The functions of the collective body can be exercised when one member is present together with the Governor-General; and there are precise rules providing for cases when the Governor-General is absent (*b*). At meetings of the council the Governor-General has a casting vote; but the decision of the majority prevails (*c*), except when the Governor-General is of opinion that the safety, tranquillity, or interests of the British possessions in India, or any part thereof, are, or may be, essentially affected (*d*). In such a case the Governor-General is empowered to overrule the majority of the council, by adopting, suspending, or rejecting the measure in question; but dissident members may require that their minutes be recorded and notified to the Secretary of State.

All proceedings of the collective body, termed "orders in council," must be expressed to be made by the Governor-General in Council, and must be signed by a secretary (*e*). Despatches to the Secretary of State are signed by the Governor-General and all the members of council present.

(iii.) *Departments of the Government.*

Departments of Government.

**1036.** Under a statutory power to the Governor-General to make rules for the transaction of business (*f*), departments have been formed, each under a member of council, corresponding to the

(*q*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 7; Indian Councils Act, 1861 (24 & 25 Vict. c. 67), s. 3; Government of India Act, 1869 (32 & 33 Vict. c. 97), s. 8; Indian Councils Act, 1874 (37 & 38 Vict. c. 91), s. 1; Indian Councils Act, 1904 (4 Edw. 7, c. 26).

(*r*) Indian Councils Act, 1861 (24 & 25 Vict. c. 67), s. 3.

(*s*) *Ibid.*, s. 9.

(*t*) *Ibid.*, s. 26.

(*a*) Government of India Act, 1833 (3 & 4 Will. 4, c. 85), section repealed by Statute Law Revision Act, 1890 (53 & 54 Vict. c. 33); Indian Councils Act, 1861 (24 & 25 Vict. c. 67), s. 27.

(*b*) *Ibid.*, ss. 6, 7.

(*c*) East India Company Act, 1772 (3 Geo. 3, c. 63), s. 8; Government of India Act, 1833 (3 & 4 Will. 4, c. 85), s. 48.

(*d*) East India Company Act, 1793 (33 Geo. 3, c. 52), ss. 47, 48, 49; Government of India Act, 1870 (33 & 34 Vict. c. 3), s. 5.

(*e*) East India Company Act, 1793 (33 Geo. 3, c. 52), s. 39; East India Company Act, 1813 (53 Geo. 3, c. 155), s. 79.

(*f*) Indian Councils Act, 1861 (24 & 25 Vict. c. 67), s. 22.

SECT. 3. The Government in India.

portfolios of a European Cabinet, and the proceedings of these departments are given the same validity as the proceedings of the Governor-General in Council.

Since 1906 the number of departments has been nine: Foreign (in the personal charge of the Governor-General), Home, Revenue and Agriculture, Legislative, Finance, Public Works (under the same member of council as Revenue and Agriculture), Commerce and Industry, Army (in charge of the Commander-in-Chief), and Military Supply (*g*). It should be added that the Foreign department has charge of all business connected with the relations between the Government and Native States, that "revenue" means land revenue, and that railways are now under a special board connected with Commerce and Industry.

(iv.) *The Army.*

Army.

**1037.** Subject to the supreme authority of the Crown, exercised by the Secretary of State, the superintendence, direction, and control of the whole military government in India is vested by statute (*h*) in the Governor-General in Council. The chief executive officer is the Commander-in-Chief, who is appointed by the Crown on the advice of the Secretary of State for War, and who is also always appointed by the Secretary of State for India to be an extraordinary member of the Governor-General's Council with rank next after the Governor-General. Until 1909 there was another military member of Council, but his duties have now been merged in those of the Army department under the Commander-in-Chief. The subordinate powers of military government formerly vested in the governors of Madras and Bombay were abolished in 1893 (*i*).

The army in India consists of two separate forces: British or European troops, and native troops. The former are under the Army Act, 1881 (*k*), and are in precisely the same position as British troops stationed in other parts of the Empire, except as regards pay, equipment etc. The native troops, on the other hand, are subject to the Indian Articles of War contained in Acts of the Indian Legislature (*l*), which were passed under powers conferred by Parliament (*m*). The British officers of the native troops, constituting a body formerly known as the Indian Staff Corps, but now as the Indian Army, are themselves subject to the Army Act. The small force of the Royal Indian Marine, which has to some extent taken the place of the former Indian Navy, is similarly under a code of discipline adopted by the Indian Legislature (*n*) under powers conferred by Parliament (*o*); but this code applies only to a ship

(*g*) "Imperial Gazetteer of India," Vol. IV., pp. 20—28. The department of Military Supply was abolished in 1909.

(*h*) Government of India Act, 1833 (3 & 4 Will. 4, c. 85), s. 39.

(*i*) By Madras and Bombay Armies Act, 1893 (56 & 57 Vict. c. 62).

(*k*) 44 & 45 Vict. c. 58.

(*l*) Indian Articles of War (Act V. of 1869), as amended by Indian Articles of War Amendment Act, 1894 (Act XII. of 1894).

(*m*) Government of India Act, 1833 (3 & 4 Will. 4, c. 85), s. 73, as confirmed by Indian Councils Act, 1861 (24 & 25 Vict. c. 67), s. 22.

(*n*) Indian Marine Service Act, 1884 (47 & 48 Vict. c. 38).

(*o*) Indian Marine Act, 1887 (Act XIV. of 1887).

within Indian waters, *i.e.*, between the Cape of Good Hope and the Straits of Magellan, which were the limits defined by the charter of Queen Elizabeth to the Company. Finally, the volunteers are under legislation of their own (*p*).

(v.) *Local Governments.*

Provinces.

**1038.** Under the general superintendence and control of the Governor-General in Council, the actual administration of the country is conducted by local Governments (*q*), in areas commonly called provinces. These areas are now thirteen in number—the two Presidencies of Madras and Bombay; the five lieutenant-governorships of Bengal, the United Provinces of Agra and Oudh, the Punjab, Burma, and Eastern Bengal and Assam; and the six chief commissionerships of the Central Provinces, the North-West Frontier Province, British Baluchistan, Ajmer-Merwara, the Andaman and Nicobar Islands, and Coorg (*r*).

Presidencies.

**1039.** Important differences exist between the status of the several classes of local Governments. Madras and Bombay still retain traces of the period when they were independent Presidencies. Their government, as regulated by statute (*a*), is vested in a Governor and two civilian members of council (*b*), appointed by the Crown, whose powers and duties are modelled on those of the Governor-General in Council. They have the privilege of communicating direct with the Secretary of State. The Governor is usually a person of rank and experience in England.

Lieutenant-governorships.

The lieutenant-governorships have likewise been constituted under powers conferred by Act of Parliament (*c*), usually in connection with the formation of a local legislative council. The Lieutenant-Governor, who must have served in India for at least ten years and who is in practice always a civilian, is appointed by the Governor-General, subject to the approval of the Crown. His powers and duties are not defined by statute, but are in practice those delegated to him. An executive council of not more than four members may be appointed for Bengal, and also for any other province under a Lieutenant-Governor, provided that in the latter case an address to the contrary is not presented by either House of Parliament (*d*).

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(*p*) Indian Volunteers Act, 1869 (Act XX. of 1869), as amended by Indian Volunteers Act Amendment Act 1896 (Act X. of 1896.)

(*q*) "Local Governments" are defined in the General Clauses Act, 1897 (X of 1897), s. 3 (29).

(*r*) "Imperial Gazetteer of India," Vol. IV., pp. 29—33.

(*a*) East India Company Act, 1793 (33 Geo. 3, c. 52), ss. 24, 25; Government of India Act, 1833 (3 & 4 Will. 4, c. 85), ss. 56, 57; Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 29; Government of India Act, 1869 (32 & 33 Vict. c. 97), s. 8.

(*b*) By the Indian Councils Act, 1909 (9 Edw. 7, c. 4), s. 2, the number of members of council may be four, of whom two must have been in the service of the Crown in India for at least twelve years.

(*c*) India (North-West Provinces) Act, 1835 (5 & 6 Will. 4, c. 52), s. 2; Government of India Act, 1853 (16 & 17 Vict. c. 95), s. 16; Government of India Act, 1854 (17 & 18 Vict. c. 77), s. 4; Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 29.

(*d*) Indian Councils Act, 1909 (9 Edw. 7, c. 4), s. 3.

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Chief commissionerships.

Chief Commissioners are still more entirely delegates of the Governor-General. Though mentioned by name in at least one Act of Parliament (*e*), they are appointed, not under any statutory authority, but under the inherent powers of the Governor-General to administer British territory that is not comprised in any existing province. The Chief Commissioner of the Central Provinces occupies a position scarcely inferior to that of a lieutenant-governor, while the others govern areas of varying size and enjoy varying degrees of independence. Such areas, however, all rank as local Governments (*f*).

(vi.) *Administration.*

Administrative areas.

**1040.** The larger provinces, with the single exception of Madras, are sub-divided, for administrative purposes, into divisions, each under a commissioner (*g*); and all are sub-divided into districts, each under an officer styled either collector (*h*) or deputy commissioner, which form the ultimate units of administration, corresponding somewhat to an English county. The total number of districts in British India is about 250, with an average area of about 4,430 square miles, and an average population of about 931,000 souls (*i*).

Indian Civil Service.

**1041.** The higher work of the general administration is reserved by statute (*j*) to members of the Indian Civil Service, who are selected by open competition in England. Some of the posts originally reserved to them are now (*k*) open to members of the several provincial services, recruited in India; while minor appointments are held by members of the subordinate services.

Apart from the general administration, a number of special departments have recently grown in importance—such as Public Works, Police, Education, Forests etc.—to which appointments are made on the same principles, classified as Indian, provincial, and subordinate. Military officers are now very rarely employed in civil government (*l*).

(vii.) *Administration in Native States.*

Native States.

**1042.** In all Native States the administration is conducted, not in the name of the Crown, but in that of the ruling chief, subject to the ultimate control of the British Government, exercised through a political agent. Power is usually delegated to a *diwan*, primarily a finance minister, and in some of the more advanced States a

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(*e*) Government of India Act, 1870 (33 & 34 Vict. c. 3), s. 3.

(*f*) As defined in the General Clauses Act, 1897 (X. of 1897), s. 3 (29).

(*g*) "Commissioner" is defined in the General Clauses Act, 1897 (X. of 1897), s. 3 (13).

(*h*) "Collector" is defined in the General Clauses Act 1897 (X. of 1897), s. 3 (10).

(*i*) "Imperial Gazetteer of India," Vol. IV., p. 48.

(*j*) Indian Civil Service Act, 1861 (24 & 25 Vict. c. 54), s. 2.

(*k*) Government of India Act, 1870 (33 & 34 Vict. c. 3), s. 6.

(*l*) It is estimated that the total number of Englishmen employed in the civil government of India is about 1,200 ("Imperial Gazetteer of India," Vol. IV., p. 42).

council of ministers has been established, who perform both advisory and executive functions; but there is nowhere any constitutional check upon the powers of the chief. Nevertheless, owing partly to the indirect control of the British Government, partly to its direct authority exercised during frequent periods of minority, and partly to other reasons, the system of administration in Native States is gradually approximating to the British model (*m*).

State troops.

**1043.** Among the attributes of sovereignty retained by Native States is military command. They enlist and control their own soldiers, both cavalry and infantry, though the number may be restricted. Even when these are placed at the disposal of the British Government, under the style of Imperial Service troops, they are paid from the revenues of the States and remain under the command of their own officers (*n*).

SUB-SECT. 2.—*Legislation.*

Legislative authority.

**1044.** The supreme legislative authority of Parliament over India has already been adverted to (*o*). Legislative authority has also been conferred by statute upon the Legislative Council of the Governor-General, on the Governor-General personally, and on local legislative councils.

**1045.** The several legislatures in India derive their authority from statute. They are, however, not delegates of Parliament, but bodies endowed with plenary, though limited, powers of legislation (*p*). The existing legislatures are constituted by the Indian Councils Act, 1861 (*q*), as amended by the Indian Councils Act, 1892 (*r*), and the Indian Councils Act, 1909 (*s*), though some of their powers are based upon earlier statutes.

(i.) *The Legislative Council of the Governor-General.*

Legislative Council of the Governor-General.

**1046.** The supreme legislative body for all India is therein defined as "the Governor-General in Council at meetings for the purpose of making laws and regulations," but is commonly known as the Legislative Council of the Governor-General. It consists of the executive council (already described), together with "additional members," not less than ten nor more than fourteen in number, nominated by the Governor-General, and resident in India (*t*). In

(*m*) The collection of land revenue is coming to be based on definite regulations; the administration of justice is coming to be intrusted to regular courts, which are required to follow broadly the codes of British India; the rule of law generally is taking the place of arbitrary power; railways and roads are being made, and schools, hospitals, and prisons erected. While some States are still backward, there are others (of which Mysore and Baroda are notable examples) where representative councils and compulsory education have been introduced.

(*n*) "Imperial Gazetteer of India," Vol. IV., chap. 3.

(*o*) See p. 590, *ante*.

(*p*) *Per* Lord SELBORNE in *R.* v. *Burah* (1878), L. R. 5 Ind. App. 178.

(*q*) 24 & 25 Vict. c. 67.

(*r*) 55 & 56 Vict. c. 14.

(*s*) 9 Edw. 7, c. 4.

(*t*) By the Indian Councils Act, 1909 (9 Edw. 7, c. 4), the number of "additional members" may be as large as sixty, including those elected under

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addition, the Lieutenant-Governor or Chief Commissioner of the province where the council may meet is an extra member. Of the additional members, at least one half must be persons not in the service of the Crown; and, according to rules made under statutory powers, five of them are nominated on the recommendation of the "non-official additional members" of the four larger local legislatures and of the Calcutta Chamber of Commerce. The term of office is for two years. There are no regular sessions nor any prorogation of the Legislative Council. Meetings are held whenever summoned, in practice always at Calcutta or Simla.

Functions.

**1047.** The council is a legislative, not a debating, body, nor does it hold control over finance. But, under statutory rules made by the Governor-General in Council, power is given to discuss the annual financial statement (*u*), and to ask questions of the member of the executive council in charge of the department concerned (*v*).

The Council is empowered by statute (*w*) to make laws—(1) for all persons, courts, places, and things within British India; (2) for all British subjects and servants of the Crown within other parts of India; (3) for all native Indian subjects, and native officers, soldiers, or followers of the Indian army, in any part of the world; and (4) for all persons serving in the Indian marine: provided that no law may be made repealing or affecting—(1) any provisions of the Government of India Act, 1833 (*x*) (excepting certain specified sections), the Government of India Act, 1853 (*y*), the Government of India Act, 1854 (*z*), the Government of India Act, 1858 (*a*), the Government of India Act, 1859 (*b*), or the Indian Councils Act, 1861 (*c*); or (2) any Act of Parliament extending to India passed after 1860; or (3) any Act enabling the Secretary of State to raise money in the United Kingdom; or (4) the Army Act; or (5) which may affect the authority of Parliament, or any part of

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regulations made by the Governor-General. It is understood that these regulations will provide for the special election of Mahomedans.

(*u*) By the Indian Councils Act, 1909 (9 Edw. 7, c. 4), further power is given to the Governor-General to make rules for the discussion of any matter of public interest.

(*v*) The business and procedure at meetings is governed by statutory rules made by the council (*Gazette of India*, February 6, 1897). Seven members form a quorum. The Governor-General presides, or in his absence the senior member of the executive council. Members speak seated, and address the president. Each member in turn is entitled to speak once, and the mover has a right of reply. Every motion is decided by a majority of votes, with a second, or casting, vote to the president. The meetings are open to the public.

(*w*) Government of India Act, 1833 (3 & 4 Will. 4, c. 85), ss. 46, 51, 73; Indian Councils Act, 1861 (24 & 25 Vict. c. 67), s. 22; Government of India Act, 1865 (28 & 29 Vict. c. 17), ss. 1, 2; Indian Councils Act, 1869 (32 & 33 Vict. c. 98), s. 1.

(*x*) 3 & 4 Will. 4, c. 85.

(*y*) 16 & 17 Vict. c. 95.

(*z*) 17 & 18 Vict. c. 77. S. 1 of this Act has been repealed as to the United Kingdom only by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19); but the Indian Legislature has no power to repeal it as to India.

(*a*) 21 & 22 Vict. c. 106.

(*b*) 22 & 23 Vict. c. 41.

(*c*) 24 & 25 Vict. c. 67.

the unwritten laws or constitution of the United Kingdom, whereon may depend in any degree the allegiance of any person to the Crown (*d*), or the sovereignty or dominion of the Crown over any part of British India (*e*).

Extent of jurisdiction.

**1048.** The Acts of the Legislative Council of the Governor-General extend over all British India, including those provinces which possess subordinate legislatures of their own. It is the sole legislative authority for those provinces which have no local legislature (*f*). As a matter of practice, its enactments are often brought into operation at different times and to different degrees in the several provinces, so that each province may have a body of legislation peculiar to itself (*g*).

(ii.) *Executive Legislation by the Governor-General.*

Emergency Ordinances.

**1049.** In cases of emergency the Governor-General is empowered (*h*) on his own personal responsibility to make ordinances for the peace and good government of British India, which shall have the force of a law passed by the Legislative Council, but only for a period not exceeding six months. This power has been exercised about seven times, of which the most recent was in 1907.

Regulations.

Another exceptional power of legislation is conferred upon

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(*d*) For the meaning of these words, see *Re Ameer Khan* (1870), 6 Bengal Law Reports, 392.

(*e*) The procedure with regard to legislation is as follows (see Rules for the Conduct of the Legislative Business of the Council of the Governor-General, *Gazette of India*, February 6, 1897):—Any member may move for leave to introduce a bill. When introduced, the bill is printed, with a full statement of objects and reasons; and both bill and statement are published in English in the *Gazette*, and also, if necessary, in any vernacular language. It is then, ordinarily, referred to a select committee, of which the law member must be a member and is usually the chairman. The report of the select committee is published in the *Gazette*, together with the amended bill if thought necessary. It is then again taken into consideration by the council, when any member may propose amendments. When passed by the majority of members, the personal assent of the Governor-General is required to give it validity, and it may subsequently be disallowed by the Crown through the Secretary of State. In cases of emergency, the ordinary procedure can be suspended and bills passed through the council at a single sitting. In practice, all bills are originated by the Government of India, and are drafted by the secretary to the Legislative Council. There is no private bill legislation, most of the matters so treated in the United Kingdom being dealt with by executive action. All enactments have a short title, and are numbered after the calendar year (*e.g.*, Act I. of 1909).

(*f*) Indian Councils Act, 1861 (24 & 25 Vict. c. 67).

(*g*) Local codes have been compiled by the legislative department for each of the several provinces, containing (1) the old regulations so far as they may be still in force; (2) Acts of the Governor-General in Council of local application; (3) regulations for scheduled districts of local application; and (4) Acts of the local legislature, if any. The dates of the latest editions of these local codes are: Madras, 1902; Punjab, 1903; Burma, 1899; Bengal, 1905-6; Baluchistan, 1900; Central Provinces, 1904; United Provinces, 1906; Ajmer, 1905; Coorg, 1893; Bombay, 1907; Assam, 1897; and North-West Frontier Province, 1903. In the case of *R.* v. *Burah* (1878), L. R. 5 Ind. App. 178, it was held by the Privy Council that the power to determine whether an Act shall be applied locally is conditional legislation and not a delegation of legislative power.

(*h*) Indian Councils Act, 1861 (24 & 25 Vict. c. 67), s. 23.

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the Governor-General in Council (*i*) (apart from his Legislative Council) to make "regulations," which have the force of laws, for certain backward areas within British India known as "scheduled districts," whenever the Local Government of such area has submitted a draft regulation for the purpose.

(iii.) *Local Legislative Councils.*

Provincial legislative councils.

**1050.** The subordinate legislative councils are all created by, or under, the same statutes (*j*) as the Legislative Council of the Governor-General. They are now seven in number—for the provinces of Madras, Bombay, Bengal, the United Provinces of Agra and Oudh (formerly the North-Western Provinces), the Punjab, Burma, and Eastern Bengal and Assam. The maximum number of nominated and elected members may vary from fifty to thirty, and rules may be made authorising the discussion of any matter of public interest, as well as the annual financial statement and the asking of questions (*k*).

Madras and Bombay.

**1051.** The Governors in Council of Madras and Bombay had legislative powers first conferred upon them in 1807 (*l*), but these powers were withdrawn in 1833 (*m*), from which date to 1861 the Governor-General in Council was the sole legislative authority for all India. By the Indian Councils Act, 1861 (*n*), as amended by the Indian Councils Act, 1892 (*o*), the Governors in Council of Madras and Bombay again received legislative powers, and their councils were enlarged with "additional members" for legislative purposes only. The constitution and procedure of these councils are similar to those of the Legislative Council of the Governor-General.

Other provinces.

**1052.** Under the same statutes the Governor-General in Council was empowered to create legislative councils for certain existing provinces therein named, and also for other provinces whenever a lieutenant-governor should be appointed to them. These, however, differ from the Legislative Councils of Madras and Bombay in that all the members are nominated for legislative purposes only, and that not less than one-third (instead of one-half) of the members must be non-official. Further, the powers of discussing the financial statement and of asking questions have not been universally conferred on these councils.

The powers of all the subordinate legislative councils are limited both as to local area and to class of subjects (*oo*). These councils may not pass a law affecting any Act of Parliament, nor (without the

(*i*) Government of India Act, 1870 (33 & 34 Vict. c. 3), ss. 1, 2.
(*j*) Indian Councils Act, 1861 (24 & 25 Vict. c. 67), amended by Indian Councils Act, 1892 (55 & 56 Vict. c. 14), and Indian Councils Act, 1909 (9 Edw. 7, c. 4).
(*k*) Indian Councils Act, 1909 (9 Edw. 7, c. 4), s. 1.
(*l*) Repealed by stat. (1807) 47 Geo. 3, sess. 2, c. 68.
(*m*) Government of India Act, 1833 (3 & 4 Will. 4, c. 85).
(*n*) 24 & 25 Vict. c. 67.
(*o*) 55 & 56 Vict. c. 14.
(*oo*) Indian Councils Act, 1861 (24 & 25 Vict. c. 67), ss. 39—43.

previous sanction of the Governor-General) altering the Penal Code, or affecting religious rites and usages, or finance, currency, post office or telegraphs, patents or copyright, or the army. Every Act passed by them requires the personal assent of the Governor or Lieutenant-Governor (as the case may be), and has no validity until the Governor-General has likewise assented thereto; it is further liable to disallowance by the Crown.

(iv.) *Legislative Authority outside British India.*

Legislation outside British India.

**1053.** Outside what is technically British India, within "administered" territory (*e.g.*, Berar), legislative authority is vested in the Governor-General in Council, as representing the sovereignty of the Crown. In his executive capacity he applies to such territory, by means of orders in council, whatever enactments are required. The same principle extends to the residencies and other stations in the occupation of political officers and to military cantonments in Native States. Of a similar nature is the legislative authority exercised by the Governor-General in Council under the Indian Foreign Jurisdiction and Extradition Act, 1879 (*p*), which corresponds to the similar statute of Parliament (*q*). That Act—after reciting that, by treaty, capitulation, agreement, grant, usage, sufferance, and other lawful means, the Governor-General in Council has power and jurisdiction within divers places beyond the limits of British India—proceeds to declare that power and regulate its exercise. *Inter alia*, it extends the law relating to offences and criminal procedure in British India to all European British subjects in Native States and to all native Indian subjects wherever found; and it enables the Governor-General, by order in council (*r*), to declare the law to be administered in Native States under its authority (*s*).

(v.) *Legislation in Native States.*

Native States.

**1054.** Apart from such legislative authority as may be exercised by the British Government in the manner described in the preceding sub-section, the legislative authority in a Native State resides in the ruling chief. In a few of the larger States, however, councils have been established to assist in the work of legislation (*t*). In

(*p*) Act XXI. of 1879.

(*q*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37).

(*r*) These orders are published by the Government of India in volumes entitled "British Enactments in force in Native States."

(*s*) This legislative authority is now exercised under the Indian (Foreign Jurisdiction) Order in Council, 1902, which applies to the territories of India outside British India, and also to any other territories in which jurisdiction may be exercised by the Governor-General in Council. The Indian Foreign Jurisdiction and Extradition Act, 1879 (XXI. of 1879) (quoted above) was repealed by the Indian Extradition Act, 1903 (XV. of 1903), which re-enacts only the portion relating to extradition.

(*t*) In Travancore, for example, a legislative council was established in 1888 consisting of eight members, of whom three must be non-official. Since its establishment it has passed fifty-eight regulations, and thus remodelled almost the whole law of the country ("Imperial Gazetteer of India," Vol. XXIV., p. 15).

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many cases the codes of British India have been adopted with modifications.

In the States attached to Madras, all enactments require to be submitted for the approval of the Governor in Council; and in the case of Mysore, no laws in force at the date of the rendition (1881) can be repealed or modified without the previous consent of the Governor-General in Council; but as a general rule no direct supervision is exercised over the legislative powers vested in a ruling chief.

SUB-SECT. 3.—*Judicial.*

(i.) *The Privy Council.*

Judicial Committee.

**1055.** The final appellate judicial authority in British India, as in other dependencies of the Crown, is vested in the Sovereign in Council, now exercised through the Judicial Committee of the Privy Council, as established in 1833 (*u*). This was first recognised by the charters constituting mayors' courts for the presidency towns in 1726, was more definitely regulated in the statute and charter constituting the Supreme Court at Calcutta in 1773 (*a*), and was indirectly extended to the provincial courts of the Company in Bengal in 1780 (*b*). The procedure with regard to appeals to the Privy Council is now contained in the charters of the High Courts and in the Code of Civil Procedure (*c*), subject to any rules that may be made by the Sovereign in Council, and subject also to the unqualified exercise of the Sovereign's pleasure to reject or receive any appeal (*d*).

Appeal in civil cases.

**1056.** In civil cases an appeal (*e*) to the Privy Council lies, as of right, from any court of final appellate jurisdiction in India against any final judgment, decree, or order, provided that the amount or value of the subject-matter in dispute is not less than Rs.10,000 (say £667); and also provided that, when the judgment appealed from affirms the decision of the court immediately below, the appeal involves some substantial question of law.

An appeal may likewise be granted against a final judgment of less value, and against any preliminary or interlocutory judgment, if the court certifies that the case is a fit one for appeal (*f*).

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(*u*) Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41). See also pp. 579 *et seq.*, *ante*, and title COURTS, Vol. IX., p. 27.

(*a*) East India Company Act, 1772 (13 Geo. 3, c. 63).

(*b*) East India Company Act, 1780 (21 Geo. 3, c. 70).

(*c*) Act V. of 1908, ss. 109—112.

(*d*) The rule as to special leave to appeal in criminal cases was thus laid down in *Re Dillet* (1887), 12 App. Cas. 459, P. C.: "Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

(*e*) Letters patent for the High Court of Judicature at Fort William in Bengal, bearing date December 28, 1865, Statutory Rules and Orders Revised, Vol. VI., India, p. 3, paras. 39—42, and Code of Civil Procedure, 1908 (Act V. of 1908), ss. 109—111. See also *Radha Krishn Das* v. *Rai Krishn Chand* (1901), L. R. 28 Ind. App. 182; and *Moti Chand* v. *Ganga Parshad Singh*, *Ex parte Moti Chand* (1901), L. R. 29 Ind. App. 40.

(*f*) Where a decree of a High Court affirms the decree appealed from leave to appeal ought not to be given unless there is, as required by s. 596 (now s. 111)

The mode of appeal is by petition to the court whose judgment is complained of, within six months from the date of such judgment, praying for a certificate of value or fitness; and when the certificate has been granted, the appellant must give security for the costs of the respondent and deposit the money required to defray the expense of copying the record. It is the duty of the court to transmit, in addition to the record, a copy of the reasons of the several judges for and against the judgment appealed against.

Criminal appeal.

**1057.** In criminal cases the only right of appeal is that granted under the High Court charters (*g*) against any judgment etc. in the exercise of the original criminal jurisdiction of the High Court, or in any criminal case where a point of law has been reserved for the opinion of the High Court, provided that the court declares the case to be a fit one for such appeal, and under such conditions as it may require.

(ii.) *The High Courts.*

Local courts.

**1058.** The local courts of judicature in British India, both civil and criminal, are constituted partly by statute and royal charter and partly under Acts of the Indian legislatures. The superior courts, exercising the highest criminal and civil jurisdiction within their respective provinces are called High Courts, Chief Courts, or Courts of Judicial Commissioners (*h*).

High Courts.

**1059.** The High Courts—four in number, at Calcutta, Madras, Bombay, and Allahabad—are constituted by charters or letters patent under the Indian High Courts Act, 1861 (*i*). They represent an amalgamation of the former Supreme Courts appointed by the Crown since 1773 with the Sadr Adalats, or appellate courts of the Company, and many of their powers are inherited from both these tribunals (*j*).

Each High Court consists of a Chief Justice and not more than fifteen judges, appointed by the Crown and holding office during pleasure. The Chief Justice must be a barrister or advocate; the judges must be either—(1) barristers or advocates of five years' standing; or (2) members of the Indian Civil Service of ten years' standing who have served for three years as a district judge; or (3) persons who have held subordinate judicial office for five years; or (4) pleaders of ten years' standing. There is a further proviso that one-third of the judges must be barristers or advocates, and that one-third must be members of the Indian Civil Service. As a

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of the Civil Procedure Code, some substantial question of law involved. An appeal admitted contrary to that section will be dismissed without being heard (*Karuppanan Servai* v. *Srinivasan Chetti* (1901), L. R. 29 Ind. App. 38).

(*g*) Letters Patent for the High Court of Judicature at Fort William in Bengal (see note (*e*) on p. 604, *ante*), para. 41. When a vakil was struck off the rolls on the ground that he had been convicted of forgery, it was held that no appeal lay to the King in Council, as that would be indirectly an appeal from a conviction (*Re Rajendro Nath Mukerji* (1899), L. R. 26 Ind. App. 242).

(*h*) All of these are included in the definition of "High Court," with reference to civil proceedings only, in the General Clauses Act, 1897 (X. of 1897), s. 3 (24).

(*i*) 24 & 25 Vict. c. 104.

(*j*) See ss. 9 and 11 of the Indian High Courts Act, 1861 (24 & 25 Vict. c. 104), and paras. 19—21 of the letters patent.

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Jurisdiction.

matter of fact, every High Court usually includes more than one native of India.

**1060.** The jurisdiction of the High Courts, while derived from the statutory charters constituting them, includes certain powers inherited from the former Supreme Courts (*k*). Their jurisdiction is original, appellate, and revisional.

The High Court at Calcutta (technically styled "the High Court of Judicature at Fort William in Bengal") may be taken as typical. It is a court of record, and a court of oyer and terminer and gaol delivery for the territories under its jurisdiction. Its ordinary original criminal jurisdiction is exercised within the local limits of the presidency town (*i.e.*, Calcutta), and also extends over all persons not within the jurisdiction of any other Indian court over whom the former Supreme Court had jurisdiction (*l*). Its extraordinary original criminal jurisdiction extends over all persons residing in places over which the former Sadr Adalat had jurisdiction (*m*).

Its ordinary original civil jurisdiction is likewise exercised within the local limits of the presidency town, with the exclusion of suits within the jurisdiction of the small cause court (*n*). Its extraordinary original civil jurisdiction enables it to remove and try any suit brought in a subordinate court subject to its superintendence, either on agreement by the parties or for purposes of justice (*o*).

It is a court of appeal from all courts, criminal and civil, subject to its superintendence (*p*). It possesses large powers of reference and revision over subordinate criminal courts (*q*).

As regards special branches of the law, it possesses the powers with respect to the persons and estates of infants and lunatics exercised by the former Supreme Court (*r*); it acts as a court for the relief of insolvent debtors (*s*), and exercises the powers of the former Supreme Court in civil and criminal admiralty proceedings (*t*), in testamentary and intestate jurisdiction (*u*), and in matters matrimonial between Christian British subjects (*w*).

It is empowered to appoint clerks and other ministerial officers (*x*), and to admit to practice advocates, vakils, and attorneys (*a*).

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(*k*) In the case of *Surendranath Banerjea* v. *Chief Justice and Judges of the High Court of Bengal*, (1883) L. R. 10 Ind. App. 179, it was held by the Privy Council that the power of the High Court to punish for contempt of court was a power inherited from the Supreme Court as part of the common law of England introduced by the original charter.

(*l*) Letters patent, para. 22.
(*m*) *Ibid.*, para. 24.
(*n*) *Ibid.*, paras. 11. 12.
(*o*) *Ibid.*, para. 13.
(*p*) *Ibid.*, paras. 15, 27.
(*q*) *Ibid.*, para. 28.
(*r*) *Ibid.*, para. 17.
(*s*) *Ibid.*, para. 18.
(*t*) *Ibid.*, paras. 32, 33.
(*u*) *Ibid.*, para. 34.
(*w*) *Ibid.*, para. 35.
(*x*) *Ibid.*, para. 8.
(*a*) *Ibid.*, paras. 9, 10.

It is also, by statute (*b*), expressly charged with the superintendence of all subordinate courts in Bengal, and with the framing of rules for the conduct of business, subject to the sanction of the Governor-General in Council.

Powers of a judge.

**1061.** Any function of the High Court, in the exercise of either its original or its appellate jurisdiction, may be performed by a single judge or by a division court; and if the judges in a division court should be equally divided in opinion, then the opinion of the senior judge is to prevail (*c*).

Appeals.

**1062.** In civil, but not in criminal, cases an appeal lies to the court in its appellate jurisdiction from any judgment of a single judge, and from the judgment of a division court whenever the judges are equally divided in opinion and do not number a majority of the whole of the judges (*d*). The right of appeal from other judgments is to the Privy Council.

Procedure.

**1063.** When the court sits to exercise its original jurisdiction, criminal or civil, the right of audience is confined to advocates, who must be instructed by attorneys. Before the court in its appellate capacity vakils are entitled to appear. All proceedings in a High Court are conducted in the English language. Trial by jury (consisting of nine jurors) is the rule in original criminal cases, but juries are never employed in civil cases in India.

Extent of jurisdiction.

**1064.** The jurisdiction of the High Court at Calcutta is not confined to the existing province of Bengal, but extends over the recently constituted province of Eastern Bengal and Assam, which was under the jurisdiction of the former Supreme Court. On the other hand, Sind is excluded from the jurisdiction of the High Court at Bombay, and Oudh is similarly excluded from the jurisdiction of the High Court at Allahabad, the powers of a High Court in both these cases being exercised by judicial commissioners.

The High Court at Allahabad is distinguished from the other three High Courts, in that it does not possess any ordinary original jurisdiction, except in criminal proceedings against European British subjects.

Chief Courts.

**1065.** Outside the provinces above mentioned, most of the functions of a High Court are vested in courts created by the Indian Legislature.

In the Punjab (since 1866) and in Lower Burma (since 1900) these are styled Chief Courts, composed of a chief judge and judges appointed by the Governor-General in Council; elsewhere the courts are composed of one or more judicial commissioners, who are usually appointed from the Indian Civil Service. Their functions are entirely appellate and revisional, except as regards criminal jurisdiction over European British subjects, and except also that the Chief Court for Lower Burma has been granted original

(*b*) Indian High Courts Act, 1861 (24 & 25 Vict. c. 104), s. 15.
(*c*) Letters patent, para. 36.
(*d*) *Ibid.*, para. 15.

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jurisdiction, criminal and civil, within the limits of Rangoon, because of its analogy to a presidency town.

(iii.) *Inferior Criminal Courts.*

Inferior criminal courts.

**1066.** Subordinate to the provincial High Courts, by whatever name they may be called, are the inferior criminal and civil courts. Under the Code of Criminal Procedure, 1898 (*e*), the style and the powers of inferior criminal courts are uniform throughout British India. They consist of courts of sessions and courts of magistrates (*f*).

Courts of sessions.

**1067.** Courts of sessions are presided over by sessions judges, or additional and assistant sessions judges, usually appointed from the Indian Civil Service, who are competent to try all persons duly committed and to award any authorised sentence (*g*).

Magistrates.

**1068.** Magistrates, who are appointed from the Indian or the Provincial Civil Service, are graded in three classes, according to the sentences of imprisonment and fine which they are authorised to pass and their power to commit for trial to a court of session (*h*).

In certain areas—described as "non-regulation"—the local Government is empowered to invest the district magistrate with power to try all offences not punishable with death (*i*). Provision is also made for the appointment of honorary or special magistrates (*k*), presidency magistrates (*l*), and cantonment magistrates for military stations (*m*). In Madras and (to a less extent) Bombay minor correctional powers are intrusted to village head-men (*n*).

Mode of trial.

**1069.** All trials before a court of session must be either by a jury or with the aid of assessors, according to the general orders of the local Government (*o*).

The jury consists of any uneven number of jurors up to nine which may be prescribed (*p*). The verdict of a majority prevails, unless the judge disagrees so completely that he considers it necessary for the ends of justice to submit the case to the High Court (or its equivalent), which is then empowered to acquit or convict, and to pass sentence (*q*).

Assessors may be two or more in number, at the discretion of the judge (*r*), who is required to record the opinion of each of

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(*e*) Act V. of 1898.
(*f*) *Ibid.*, s. 6. "Magistrate" is defined in the General Clauses Act, 1897 (X. of 1897), s. 3 (31).
(*g*) *Ibid.*, ss. 9, 31.
(*h*) *Ibid.*, ss. 10—17, 32—38.
(*i*) *Ibid.*, ss. 30, 34.
(*k*) *Ibid.*, ss. 14—17.
(*l*) *Ibid.*, ss. 18—21.
(*m*) *Ibid.*, ss. 1, 13, and s. 3 of the Cantonments Act, 1880 (Act III. of 1880).
(*n*) Code of Criminal Procedure, 1898 (Act V. of 1898), s. 1.
(*o*) *Ibid.*, ss. 268, 269.
(*p*) *Ibid.*, s. 274.
(*q*) *Ibid.*, ss. 306, 307.
(*r*) *Ibid.*, s. 284.

them, but in giving judgment is not bound to conform to their opinions (*s*).

All sentences of death must be confirmed by the High Court (or its equivalent) before execution (*t*); and the prerogative of mercy is exercisable by both the local Government concerned and the Governor-General in Council (*a*).

Appeal.

**1070.** The right of appeal given by the Code of Criminal Procedure is very wide. Against a judgment of acquittal, whether original or appellate, the local Government may direct that an appeal be presented to the High Court (or its equivalent) (*b*).

Any person convicted may appeal on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal lies on a matter of law only (including the alleged severity of a sentence) (*c*), and except also when the sentence does not exceed one month's imprisonment or a fine of Rs.50 (*d*).

The appeal is ordinarily to the court of next higher jurisdiction (*e*). The appellate court may hear further evidence, may reverse or modify the sentence (so as not to enhance it), provided that the verdict of a jury may not be altered unless the court is of opinion that such verdict was erroneous owing to a misdirection by the judge or to a misunderstanding of the law by the jury (*f*).

When the judges composing the appellate court are equally divided in opinion, the case must be laid before another judge of the same court, whose opinion is final (*g*).

In addition to the procedure on appeal, sessions judges and district magistrates have large powers of calling for records of inferior courts and reporting to the High Court (*h*); while the High Court (or its equivalent) is empowered, under its revisional jurisdiction, even to enhance the sentence in cases so referred to it or called for by itself (*i*).

(iv.) *Inferior Civil Courts.*

Inferior civil courts.

**1071.** The inferior civil courts are constituted by special Acts, which vary considerably for different provinces (*k*), though their

(*s*) Code of Criminal Procedure, 1898 (Act V. of 1898), s. 309.
(*t*) *Ibid.*, s. 381.
(*a*) *Ibid.*, s. 402.
(*b*) *Ibid.*, s. 417.
(*c*) *Ibid.*, s. 418.
(*d*) *Ibid.*, s. 413.
(*e*) *Ibid.*, ss. 407, 408, 410.
(*f*) *Ibid.*, s. 423.
(*g*) *Ibid.*, s. 429.
(*h*) *Ibid.*, ss. 435—438.
(*i*) *Ibid.*, s. 439.
(*k*) For Bengal, Eastern Bengal, the United Provinces, and Assam, the Bengal, North-Western Provinces and Assam Civil Courts Act, 1887 (Act XII. of 1887); for Madras, Madras Civil Courts Act, 1873 (Act III. of 1873); for Bombay, Bombay Civil Courts Act, 1869 (Act XIV. of 1869); for the Punjab, Punjab Courts Act, 1884 (Act XVIII. of 1884); for the Central Provinces, Central Provinces Courts Act, 1904 (Act II. of 1904); for Lower Burma, Lower Burma Courts Act, 1900 (Act VI. of 1900); for the North-West Frontier Province, Regulation VII. of 1907.

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procedure generally is regulated by the Code of Civil Procedure (*l*), and in particular by the rule that every suit must be instituted in the court of the lowest grade competent to try it (*m*). The classes of courts often have different names in different provinces; sometimes the number of classes extends to six or even eight; and in the areas before described as "non-regulation," judicial functions are usually vested in officers of the ordinary administrative staff.

Jurisdiction.

**1072.** The scheme of inferior civil courts in Bengal may be taken as representative of an advanced province (*n*).

The highest court is that of the district judge (*o*), who is the same person as the sessions judge for criminal cases. His jurisdiction extends to all original suits, of whatever amount and character, which are cognisable by civil courts; and he is further empowered to supervise and distribute business among all the other courts within his district.

Next to the district judge are subordinate judges, whose jurisdiction is co-extensive with that of the district judge; and below them are munsifs, whose jurisdiction is ordinarily limited to suits of which the value does not exceed Rs.1,000 (say £67), but may be extended to the limit of Rs.2,000.

In addition, there exists special courts of small causes, with summary jurisdiction and a restricted right of appeal, for the trial of simple money suits not exceeding Rs.500 in value, which limit may be extended to Rs.1,000 (*p*). In the presidency towns these small cause courts may dispose of cases where the value of the subject-matter does not exceed Rs.2,000, or even more when the parties consent (*q*).

Subordinate judges and munsifs are appointed from the subordinate judicial service, on the recommendation of the High Court, and are almost universally natives of India. Civil suits are never tried by jury.

Appeals.

**1073.** The latitude of appeal is as wide as in criminal cases, being always to the court of next higher jurisdiction, with a second appeal to the High Court (or its equivalent) on any of the following grounds—namely, (1) the decision (*r*) being contrary to some specified law or usage having the force of law; (2) the decision having failed to determine some material issue of law or usage having the force of law; (3) a substantial error or defect in the procedure as prescribed by the Code or any other law, which may possibly have

(*l*) Code of Civil Procedure, 1908 (Act V. of 1908).
(*m*) *Ibid.*, s. 15.
(*n*) "Imperial Gazetteer of India," Vol. IV., p. 150.
(*o*) "District judge" is defined in the General Clauses Act, 1897 (Act X. of 1897), s. 3 (15).
(*p*) These courts are established for the several provinces under the Provincial Small Cause Courts Act, 1887 (Act IX. of 1887).
(*q*) These courts are established for the presidency towns under the Presidency Small Cause Courts Act, 1882 (Act XV. of 1882).
(*r*) It should be remarked that "decree, preliminary or final" is the term used for the formal expression of an adjudication of any court (Code of Civil Procedure, 1908 (Act V. of 1908), s. 2 (2)); whereas "judgment" means the statement given by the judge of the grounds of a decree (*ibid.*, s. 2 (9)).

produced error or defect in the decision of the case upon the merits (*s*).

As in the case of the criminal courts, the High Court exercises, in addition to appeal, general powers of revision (*t*).

(v.) *Criminal Jurisdiction over European British Subjects* (*u*).

Privileges of European British subjects.

**1074.** European British subjects formerly possessed certain special privileges in the criminal courts. One of these privileges was that no magistrate or judge could exercise jurisdiction over them unless he had been appointed a justice of the peace and was also himself a European British subject.

Since 1884 (*v*) this rule of law has been modified by making every sessions judge, district magistrate, and presidency magistrate *ex officio* a justice of the peace, and conferring upon them a limited jurisdiction over European British subjects, whether they are themselves such or not.

But a European British subject still possesses the following privileges: He may claim a trial by jury in all cases (*x*), and the jury must be a mixed one, one-half being Europeans or Americans (*y*); in all cases punishable with death or transportation for life his trial must be before a High Court (*a*); he is given a right in the nature of a writ of *habeas corpus* throughout India (*b*), whereas for natives such right is limited to the presidency towns; and he is exempt from the criminal jurisdiction of any Native State. There is also a statutory provision (*c*) prohibiting the Governor-General in Council from making any law, without the previous consent of the Secretary of State, that would empower any court other than a chartered High Court to sentence to death a European British subject (as there defined).

Under the Criminal Procedure Code (*d*), any European (not being a European British subject) or American may claim, in the case of a trial before a jury or assessors, that one half of the jury or assessors shall be, if practicable, Europeans or Americans.

(vi.) *Union of Executive and Judicial Functions* (*e*).

**1075.** In accordance with the practice inherited from the days of native rule, all the subordinate duties of government—

(*s*) Code of Civil Procedure Act, 1908 (Act V. of 1908), s. 100.
(*t*) *Ibid.*, s. 115.
(*u*) In the Code of Criminal Procedure, 1898 (Act V. of 1898), s. 4 (1) (i), "European British subject" is interpreted to mean "any subject of His Majesty born, naturalised, or domiciled in the United Kingdom, or in any of the European, American, or Australian Colonies or Possessions of His Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal; and any child or grandchild of any such person by legitimate descent."
(*v*) Act III. of 1884, s. 3, amending s. 443 of the Code of Criminal Procedure, 1882 (Act X. of 1882).
(*x*) Code of Criminal Procedure Act, 1898 (Act V. of 1898), s. 451 (1).
(*y*) *Ibid.*, s. 451.
(*a*) *Ibid.*, s. 447 (2).
(*b*) *Ibid.*, s. 456.
(*c*) Government of India Act, 1833 (3 & 4 Will. 4, c. 85), s. 46.
(*d*) Code of Criminal Procedure, 1898 (Act V. of 1898), ss. 460—463.
(*e*) "Imperial Gazetteer of India," Vol. IV., pp. 153, 154.

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administrative, fiscal, and judicial—are still performed in some of the backward tracts of India by the same officials. But in proportion as the administrative system has gradually become more complex, courts of civil justice have attained a status of independence, while criminal jurisdiction continues to be exercised by the same persons as govern districts and supervise the police. The collector or deputy commissioner is responsible for the entire administration of criminal justice in his district, subject to the jurisdiction of the sessions judge. As district magistrate, though he may not often sit in court, all the assistant magistrates are directly subordinate to him; and he possesses large powers of control over their jurisdiction (*f*).

Union of executive and judicial functions.

(vii.) *Revenue Courts.*

Revenue courts.

**1076**. Apart from the ordinary civil courts, there exists in India a peculiar jurisdiction, arising from the importance of the land revenue, which may to some extent be compared with the old Exchequer jurisdiction in England. Revenue courts (*g*), as they are called, while constituted primarily for the purpose of determining and collecting revenue, have also had at various times large powers intrusted to them for the decision of questions connected with rent and tenancy and extending to possessory title.

These courts are presided over by the collector or deputy commissioner of the district, or by subordinate fiscal officials; and their jurisdiction varies widely in the several provinces. The tendency of modern legislation is to confine their powers to the collection of revenue, and to relegate rent suits as well as all questions of title to the civil courts. In the less advanced provinces civil and revenue jurisdiction is usually vested in the same persons (*h*).

(viii.) *British Courts outside British India.*

Courts outside British India.

**1077**. Outside British India the courts that exercise jurisdiction, criminal and civil, under powers conferred upon them by the executive authority of the Governor-General in Council are closely modelled, so far as the circumstances admit, upon the courts of British India. Just as the legislation in force in these "administered areas" is applied by executive authority, so the ordinary officials are clothed by the same authority with judicial powers, graduated as in British India. The head of the local administration is usually constituted a High Court, and thus becomes the final court of appeal; but the criminal jurisdiction over European British subjects is always reserved to a High Court in British India.

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(*f*) In the present year (1909) a scheme has been approved—to be at first applied only to Bengal—by which the whole series of criminal courts will be separated from the ordinary administration, just as the civil courts already have been, and placed under a magistrate in the judicial line of the service, independent of the present district magistrate, while the latter will retain his existing control of the police, and also wide powers for the prevention of crime and suppression of disturbances.

(*g*) "Revenue Court" is defined in the Code of Civil Procedure, 1908 (Act V. of 1908), s. 5 (2).

(*h*) "Imperial Gazetteer of India," Vol. IV., p. 153.

(ix.) *Courts in Native States.*

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Courts in Native States.

**1078.** Subject to what has been already stated with regard to personal jurisdiction over European British subjects and territorial jurisdiction over residencies, cantonments, and railways vested in British courts, the constitution and extent of the judicial authority in Native States depends upon the rank of the several States as recognised by the Government of India (*i*).

In all the larger States the ruling chiefs themselves possess the supreme judicial authority, extending to the power of life and death over their own subjects, though there is a growing tendency among them to delegate jurisdiction to regular tribunals modelled on those existing in British India, with an ultimate appeal to the chief in person.

In States of smaller size all heinous cases must be submitted to the political agents (*k*).

And there are a considerable number of so-called States whose size is so insignificant that their chiefs are permitted to exercise no judicial authority, criminal or civil, which is entirely vested in British officers. Criminal jurisdiction over European British subjects is always reserved to some High Court in British India (*l*).

## SECT. 4.—*The Law of India.*

### SUB-SECT. 1.—*In General.*

Sources of law.

**1079.** The law in force in British India is derived from many different sources. Apart from direct legislation, which has been continually extending its domain, the main sources are two-fold—(1) The personal law of the natives of the country, Hindu, Mahomedan, and others; and (2) the English law introduced by English settlement and conquest. In former times these two sources of law were to some extent antagonistic to one another, being administered by courts of rival jurisdiction and over distinct areas of territory.

To the present day all questions relating (*e.g.*) to inheritance or marriage among the natives are decided in accordance with the interpretation to be placed upon the Shastras of the Hindus, or

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(*i*) Under the Code of Civil Procedure, 1908 (Act V. of 1908), s. 44, th Governor-General in Council is empowered to provide for the execution in British India of the decrees of civil and revenue courts in Native States.

(*k*) In no case, however, is there any right of appeal to the King in Council from the judicial court of a political agent (*Hemchand Devchand* v. *Azam Sakarlal Chhotamlal* (1905), L. R. 33 Ind. App. 1).

(*l*) By way of example, reference may be made to the judicial system in the Central India Agency, which consists of no less than 148 States of very varying size and status. Of these only seven possess (without special authorisation) full powers of life and death. In the others, the criminal and civil jurisdiction of the political officers is graded according to the system prevailing in British India, and the appellate powers of a High Court are vested in the agent to the Governor-General. In the large State of Gwalior a similar gradation of courts (with vernacular titles) was introduced as early as 1888; and codes, based on those of British India, but modified to suit local customs, were adopted in 1895. The Maharaja retains the power of hearing in person appeals against the decisions of the highest court, and all sentences of death must be submitted to him for confirmation ("Imperial Gazetteer of India," Vol. IX., pp. 375—378).

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upon the commentaries on the Koran, both of which lay claim to divine authority; and a large field is left to be determined by family custom or tribal and local usage.

When native law was defective or inapplicable, the decision of the courts established by the East India Company throughout India was to be governed by the principles of justice, equity, and good conscience (*m*); and this rule, under the influence of English judges, necessarily led to the introduction of much English law.

On the other hand, the Supreme Courts established by the Crown in the three presidency towns knew no other law than the law of England, which they administered within their local jurisdiction and applied to all European British subjects.

This antagonism between two different systems of law was practically abolished after the government passed from the Company to the Crown. The Sadr Adalats of the Company and the Supreme Courts of the Crown were then merged in the existing High Courts (*n*), while the new legislative council was enabled to carry out promptly large means of codification that had long been in preparation.

SUB-SECT. 2.—*Statute Law.*

Application of English law.

**1080.** By the Royal Charter of 1726 establishing mayors' courts in the three presidency towns (*o*) of Calcutta, Madras, and Bombay, all unrepealed Acts of Parliament prior to that date, together with the common law of England as it existed at that date, so far as such Acts and such law were applicable to local circumstances, were given the force of law in those towns (*p*).

Acts of Parliament passed since 1726 are of force in India, if they, expressly or by necessary implication, extend to India, subject, however, to a limited power of amendment (*q*) conferred on the Indian legislature (*r*).

Regulations.

**1081.** Statutory power to regulate both the law and the procedure adopted in the courts of the East India Company was first

(*m*) These words first appear in Regulation (Bengal) VII. of 1832. They are incorporated in the Letters Patent of the High Courts (para. 19), and also in the Laws Acts of the several provinces.

(*n*) By the Indian High Courts Act, 1861 (24 & 25 Vict. c. 104).

(*o*) "Presidency town" is defined in the General Clauses Act, 1897 (Act X. of 1897), s. 3 (41); and by the Burma Courts Act, 1872 (VII. of 1872), s. 7, the law administered by the High Court at Calcutta in the exercise of its ordinary original civil jurisdiction is extended to Rangoon.

(*p*) See *Lyons (Mayor)* v. *East India Co.* (1836), 1 Moo. P. C. C. 175 (which decided that the English law incapacitating aliens from holding real estate had never been expressly introduced into Bengal, and that the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), did not apply to India); and *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186, P. C. (which decided that the English laws of maintenance and champerty are not of force in India).

(*q*) Indian Councils Act, 1861 (24 & 25 Vict. c. 67), ss. 22, 42.

(*r*) A revised edition of these Acts, under the title of "A Collection of Statutes relating to India," was published at Calcutta by the authority of the Government in two volumes in 1899 and 1901. It contains only three statutes (10 Will. 3, c. 22; 11 Will. 3, c. 12; and 7 Ann. c. 5) passed before 1726, which are believed to be still of possible application to the presidency towns. It omits all statutes passed since 1861 which have been locally repealed in India; and it contains a list of such statutes, and of statutes which have been modified by the Indian legislature.

conferred upon the Governor-General in Council of Bengal by the Regulating Act of 1772 (*s*), as amended in 1780 (*t*). It was extended to Madras and Bombay in 1807 (*u*), but was withdrawn from them in 1833 (*v*), from which date to 1861 (*x*) the Governor-General in Council was the sole legislative authority for all British India.

Enactments passed under these early statutory powers are known as Regulations; and many of them are still in force, among which it is sufficient to specify Regulation VIII. (Bengal) of 1793, declaring permanent the settlement of the land revenue of Bengal.

SUB-SECT. 3.—*Codification.*

Codification.

**1082.** The Government of India Act of 1833 (*y*) added a law member to the Governor-General's Council, and also provided for the appointment of a Law Commission in India with the law member as its head (*a*). Under this Commission the Penal Code was drafted, though this did not become law until 1860.

A second Commission, appointed under the Government of India Act of 1853 (*b*), sat in England, and drafted the Codes of Civil and Criminal Procedure, which were passed into law in 1859 and 1861 respectively, thus completing the field of adjective law.

A third Commission was appointed in 1861, with the duty of framing a body of substantive law, for which the law of England should be used as basis; but, after several draft Acts had been submitted, this Commission came to an end in 1870.

In the meantime a number of minor codes had been passed by the Legislative Council (*c*); and it was finally decided that the work of further codification should be carried out in India rather than in England.

(i.) *The Penal Code.*

Penal Code.

**1083.** The Indian Penal Code (*d*), though originally drafted by Macaulay in 1839, did not become law until 1860, and this code has since required very few amendments. Including these amendments, which, according to the Indian method of legislation, are always incorporated into the original Act, it consists of 511 sections, which are arranged under twenty-three chapters: (1) introduction, containing provisions relating to personal application, local extent, and saving for other laws; (2) general explanations, consisting of an elaborate interpretation clause; (3) punishments, which are eight in number—death, transportation (as a rule for life), penal servitude

(*s*) East India Company Act, 1772 (13 Geo. 3, c. 63), s. 36.
(*t*) East India Company Act, 1780 (21 Geo. 3, c. 70), s. 23.
(*u*) Now repealed, 47 Geo. 3, sess. 2, c. 68.
(*v*) Government of India Act, 1833 (3 & 4 Will. 4, c. 85), s. 59.
(*x*) Indian Councils Act, 1861 (24 & 25 Vict. c. 67).
(*y*) 3 & 4 Will. 4, c. 85.
(*a*) The first law member was Macaulay.
(*b*) 16 & 17 Vict. c. 95.
(*c*) These were chiefly drafted by Sir H. S. Maine and Sir James Stephen.
(*d*) Act XLV. of 1860, as amended by Acts VI. of 1861. the repealing Act, 1870 (XIV. of 1870), XXVII. of 1870, XIX. of 1872, Indian Oaths Act, 1873 (X. of 1873), VIII. of 1882, and Indian Penal Code Amendment Act, 1898 (IV. of 1898).

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(for Europeans), imprisonment (rigorous and simple), detention in a reformatory (for boys under sixteen), whipping (only for males under forty-six), forfeiture, and fine; (4) general exceptions, stating the facts which negative responsibility or justify acts otherwise criminal; (5) abetment; (6), (7), (8), (9), (10), (11), (12), (13) offences against the State, relating to the army and navy, against public tranquillity, by or relating to public servants, contempts of the lawful authority of public servants, against public justice (including false evidence), relating to coin and Government stamps, and relating to weights and measures; (14) and (15) offences affecting the public health, safety, convenience, decency, and morals, and relating to religion; (16) offences affecting the human body, among which murder is carefully distinguished from other kinds of culpable homicide; (17) offences against property, among which "dacoity" is defined as robbery by five or more persons; (18) offences relating to documents (including forgery) and to trade or property marks; (19) criminal breach of contracts of service, strictly limited to cases of great social inconvenience; (20) offences relating to marriage, including adultery as a crime; (21) defamation, with no less than ten excepted cases where imputations prejudicial to character are tolerated; (22) criminal intimidation, insult, and annoyance; (23) attempts to commit offences (*e*).

(ii.) *The Criminal and Civil Procedure Codes.*

Criminal Procedure Code.

**1084.** The original Code of Criminal Procedure, as passed in 1861 (*f*), was revised and consolidated in 1882 (*g*), and again in 1898 (*h*). This last revision, which repealed and replaced no less than eighteen separate enactments, is contained in 565 sections, divided into forty-six chapters. It constitutes and defines the powers of all the criminal courts throughout British India, excepting the High Courts (and their equivalents). Besides regulating the entire course of criminal procedure, from complaint to judgment, appeal, and execution, it deals (to some extent) with the preventive action of the police, with security for keeping the peace and for good behaviour, with the dispersion of unlawful assemblies, and with the suppression of nuisances.

Civil Procedure Code.

**1085.** The original Code of Civil Procedure, as passed in 1859 (*i*), was revised and consolidated in 1877 (*k*), again in 1882 (*l*), and

(*e*) Like the other Indian codes, the Penal Code has for its basis the law of England, stripped of technicalities, shortened and simplified, but modified in some few particulars to suit the local circumstances. One of its peculiarities that must be mentioned is the use of specific illustrations added to general propositions—an invention due to Bentham and here introduced by the authority of Macaulay. These make nothing law which would not be law without them; but they are in the nature of cases decided, not by judges, but by the legislature, upon the provisions of the enactments in which they occur. For the weight to be attached to these illustrations, see *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (1881), Indian Law Reports, 7 Calcutta, 132.

(*f*) Code of Criminal Procedure, 1861 (Act XXV. of 1861).
(*g*) Code of Criminal Procedure, 1882 (Act X. of 1882).
(*h*) Code of Criminal Procedure, 1898 (Act V. of 1898).
(*i*) Code of Civil Procedure, 1859 (Act VIII. of 1859).
(*k*) Code of Civil Procedure, 1877 (Act X. of 1877).
(*l*) Code of Civil Procedure, 1882 (Act XIV. of 1882).

finally in 1908 (*m*). It consists of 158 sections, divided into eleven parts, with no less than fifty-one orders containing rules, which are placed in a schedule. While it regulates the entire course of civil procedure (including certain rules relating to the High Courts), it does not constitute the civil courts or define their powers. These courts are constituted and their powers defined by special legislation.

Indian Evidence Act.

**1086.** Closely connected with the Procedure Codes is the Indian Evidence Act, 1872 (*n*), which was drafted by Sir James Stephen, and consists of 167 sections, divided into three parts and eleven chapters. While mainly based upon the English law of evidence, it differs from that law in several material points.

(iii.) *Other Codifying Acts.*

Succession Act.

Contract Act.

Specific Relief Act.

Limitation Act.

Negotiable Instruments Act.

Trusts Act.

Transfer of Property Act

Easements Act etc.

**1087.** Other codifying Acts, in order of date, are—the Succession Act, 1865 (*o*), dealing with intestate succession in the case of all classes domiciled in British India other than Hindus, Mahomedans, Buddhists, and Parsis, each of which communities has laws of its own on the subject; the Contract Act, 1872 (*p*), dealing specially with sale of goods, indemnity and guarantee, bailment (including pledge), warranty, agency, and private partnership; the Specific Relief Act, 1877 (*q*), dealing with the recovery of possession of property, the specific performance of contracts, the rectification and rescission of contracts, the appointment of receivers, the enforcement of public duties, and injunctions; the Limitation Act, 1877 (*r*), dealing both with the limitation of suits and with the acquisition of ownership by possession; the Negotiable Instruments Act, 1881 (*s*), dealing with promissory notes, bills of exchange, and cheques, with a saving for any local usage relating to instruments in an Oriental language; the Trusts Act, 1832 (*t*), with a saving for religious or charitable endowments and the mutual relations of the members of an undivided family; the Transfer of Property Act, 1882 (*a*), dealing with transfer generally of both movable and immovable property, with sale, mortgage, and lease of immovable property, with exchange and gift, and with transfer of actionable claims; the Easements Act, 1882 (*b*), first applied only to Madras, but afterwards extended to several other provinces (*c*); the Companies Act, 1882 (*d*); and the Guardians and Wards Act,

(*m*) Code of Civil Procedure, 1908 (Act V. of 1908). The most important result of this last revision is that a great part of the procedure, now placed in a schedule, is subject to amendment (ss. 121—123) by any High Court after a report by a rule committee.
(*n*) Act I. of 1872.
(*o*) Act X. of 1865.
(*p*) Act IX. of 1872.
(*q*) Act I. of 1877.
(*r*) Act XV. of 1877.
(*s*) Act XXVI. of 1881.
(*t*) Act II. of 1882.
(*a*) Act IV. of 1882.
(*b*) Act V. of 1882.
(*c*) Act VIII. of 1891.
(*d*) Act VI. of 1882.

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1890 (*e*). Since 1890 the work of codification has practically ceased (*f*).

SUB-SECT. 4.—*Personal Law.*

Personal law.

**1088.** A large portion of the law administered by the courts of justice in India is personal—that is to say, it varies with the different classes of the population, especially as regards marriage and succession. The English residents have brought with them the law of England, both the common law and the statute law, so far as applicable to their new surroundings; and this law has also been accepted by some other small Christian communities, such as the Armenians. The two dominant religious bodies of Hindus and Mahomedans equally enjoy the unimpeded exercise of the rules and customs contained in their respective sacred books, except in so far as these may have been decided to violate the fundamental principles of natural justice (*g*).

English courts may thus be called upon to determine issues arising from polygamy, or from idolatry (*h*). Hindu law is not uniform for all Hindus, nor Mahomedan law for all Mahomedans; each may vary according to locality or sect (*i*). Unwritten usage also has great weight, especially in North-Western India, where tribal usage is held superior to the written text-books (*j*). So, again, the unorthodox sect of Jains among the Hindus (*k*), the small

(*e*) Act VIII. of 1890.

(*f*) Apart from the Penal Code and the two Procedure Codes, the other codifying Acts have been subjected to much adverse criticism. They have been condemned as being, in so far as they are not superfluous, calculated to make the law rigid and inelastic, though it is likewise admitted that they have made the law more accessible and have tended to improve its substance. In result, a code of the law of torts or actionable wrongs, drafted by Sir Frederick Pollock (printed as an appendix to Pollock, Law of Torts), has been left unconsidered for more than twenty years, and the suggestion that the leading principles of both Hindu and Mahomedan law should be codified has failed to meet with acceptance. Meanwhile, considerable progress has been achieved in the more humble sphere of statute law revision and consolidation; and the statute-book is kept up to date by frequent new editions. The last edition (1898—9) has been supplemented by a volume containing the Acts up to the end of 1903.

(*g*) It may further be mentioned that, under the Code of Criminal Procedure, 1898 (Act V. of 1898), s. 48, searches, in view of an arrest, in *zananas* or women's apartments, are subject to special regulations; and that, under the Code of Civil Procedure, 1908 (Act V. of 1908), ss. 132, 133, women who, under the customs of the country, ought not to be required to appear in public, and also men on whom the same privilege has been personally conferred by the Government, are exempted from appearance in a civil court.

(*h*) It has been held by the Privy Council that an idol may be regarded as a judicial person, capable as such of holding property, though the right to sue in respect to the property is vested in the *sebait* or manager (*Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi* (1904), L. R. 31 Ind. App. 203).

(*i*) See J. D. Mayne, "Hindu Law and Usage," 5th ed., 1892; and Ameer Ali. "Mahommedan Law," Calcutta, 1894, 1904.

(*j*) The Punjab Laws Act, 1872 (Act IV. of 1872, as amended by Act XII. of 1878), expressly directs the courts to observe any custom applicable to the parties concerned, which is not contrary to justice, equity, or good conscience, and has not been altered or abolished by law, or declared by competent authority to be void.

(*k*) In the case of *Sheo Singh Rai* v. *Mussumut Dakho* (1878), L. R. 5 Ind. App.

but influential community of Parsis, and the Buddhists in Burma each follow their own personal law.

Its application.

**1089.** The principle of the personal law was first adopted by Warren Hastings, as early as 1772, when he framed a rule for the courts of the Company that "in all suits regarding marriage, inheritance, and caste, and other religious usages and institutions, the laws of the Koran with respect to Mahomedans, and those of the Shashter with respect to Gentoos [= Hindus], shall be invariably adhered to."

This principle was applied, almost in the same words, to the Supreme Court at Calcutta in 1781 by an Act of Parliament (*l*) which has never been repealed, though it has from time to time been altered by the Indian Legislature. Of such alterations two are of special importance. In 1832 (*m*) it was enacted that the rule was intended for the protection, not the deprivation, of rights; and that, consequently, when the parties to a suit were of different religions, then "the decision shall be governed by the principles of justice, equity, and good conscience." Again, in 1850 (*n*), it was enacted that "so much of any law or usage now in force . . . as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law."

On the other hand, special exemptions in favour of Hindu and Mahomedan law are contained in many of the recent codifying Acts dealing with substantive civil law. For example, the Indian Succession Act, 1865 (*o*), was expressly declared not to apply to the property of any Hindu, Mahomedan, or Buddhist, though this exemption has been modified by the Probate and Administration Act, 1881 (*p*). The Transfer of Property Act, 1882 (*q*), so far as it relates to the transfer of property by the act of the parties, is not to affect any rule of Hindu, Mahomedan, or Buddhist law. And nothing in the Indian Trusts Act, 1882 (*r*), is to affect the rules of Mahomedan law as to *wakf* (charitable trust), or the mutual relations of the members of an undivided family as determined by any customary or personal law, or to apply to public or private religious or charitable endowments.

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87, it was held by the Privy Council that the Jains possess the privilege of being governed by their own peculiar laws and customs, when these are capable of being ascertained.

(*l*) East India Company Act, 1780 (21 Geo. 3, c. 70), ss. 17, 18.

(*m*) Regulation (Bengal) VII. of 1832.

(*n*) Act XXI. of 1850.

(*o*) Act X. of 1865.

(*p*) Act V. of 1881. Under this Act it has been held that the term "Hindu" on its true construction includes Sikh; and a Hindu does not cease to be such within the meaning of the Act by becoming a member of the Brahmo Samaj or by occasional lapses from orthodox Hindu practice, so long as he is not otherwise separated from the religious communion in which he was born (*Rani Bhagwan Kuar* v. *Jogendra Chandra Bose* (1903), L. R. 30 Ind. App. 249).

(*q*) Act IV. of 1882.

(*r*) Act II. of 1882.

**The Law of India.**

Deportation.

**1090.** Indian legislation includes several special measures for the prevention and repression of crime. Under Regulations passed early in the nineteenth century, the Government of India and also the Governments of Madras and Bombay are empowered to exercise a right commonly described as "deportation," which may be said to correspond with the suspension of the Habeas Corpus Act in England. A warrant of imprisonment for an indefinite period may be issued by the Government concerned, whenever "reasons of state render it necessary to place under personal restraint individuals against whom there may not be sufficient grounds to institute any judicial proceedings, or when such proceeding may not be adapted to the nature of the case and may for other reasons be undesirable or improper" (*s*). Frequent use has been made of these Regulations in recent years.

Prevention of offences.

**1091.** Part IV. of the Code of Criminal Procedure (*t*), which is entitled "Prevention of Offences," contains six chapters dealing with: (1) security for keeping the peace and for good behaviour; (2) dispersion of unlawful assemblies; (3) suppression of public nuisances; (4) temporary orders in urgent cases of nuisance or apprehended danger; (5) disputes as to immovable property; and (6) preventive action of the police generally. The common element in all these provisions is the power given to the executive to anticipate offences by preventive action. For example, whenever a magistrate of the first class receives information that any person is taking precautions to conceal his presence with a view to committing an offence, or has no ostensible means of subsistence, or cannot give a satisfactory account of himself, he may order such person to execute a bond, with sureties, for good behaviour, and in default to be imprisoned. The chapter on dispersion of unlawful assemblies, which contains the rules for calling out and employing the military (and volunteers) in aid of the civil power, expressly indemnifies all persons acting in good faith in compliance with requisitions, and forbids prosecutions except with the sanction of the Governor-General in Council.

*Ex parte* inquiries.

**1092.** In order to provide for the more speedy trial of anarchical offences, and for the suppression of associations dangerous to the public peace, an Act was recently passed by the Governor-General's Legislative Council (*u*), which effects important changes in the ordinary law. In a large class of criminal offences specially enumerated (including offences against the State, abetment of mutiny, rioting, murder, grievous hurt, robbery, housebreaking, extortion, intimidation etc.) a magistrate is empowered, with special sanction from the Government, to hold an *ex parte* inquiry without the presence of the accused or of his legal representative, and to refuse bail. This procedure, it may be remarked,

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(*s*) Bengal State Prisoners Regulation of 1818; Madras, 1819; Bombay, 1827.
(*t*) Code of Criminal Procedure, 1898 (Act V. of 1898), ss. 106—152.
(*u*) Indian Criminal Law Amendment Act, 1908 (Act XIV. of 1908).

is not unlike that regularly adopted by the Procurator-Fiscal in Scotland. If the magistrate commits, the trial is to be held before a bench of three judges of the High Court, without a jury; and the evidence of a witness taken by the magistrate, if the witness has since died or cannot be produced, may be admitted at the trial, should the judges have reason to believe that his death or absence was caused in the interest of the accused.

Trial without jury.

By the same Act two kinds of associations are expressly declared unlawful: (1), those which encourage or aid persons to commit acts of violence or intimidation, or of which the members habitually commit such acts; (2), those specially declared by the Governor-General to interfere with the administration of the law or with the maintenance of law and order, or to constitute a danger to the public peace. Penalties are imposed on members of such associations, and severer penalties on persons who manage or promote them.

Unlawful associations.

In accordance with Indian practice, this Act applies *suo vigore* only to two provinces (Bengal and Eastern Bengal and Assam), but may be extended to other parts of the country by the Governor-General.

SUB-SECT. 6.—*British Law outside British India* (*v*).

**1093.** British jurisdiction outside the limits of British India comes under two heads—(1) legislative enactments; and (2) executive orders of the Governor-General in Council.

British law outside British India.

By a series of Acts of Parliament (*w*) the Indian Legislature has been expressly empowered to make laws—(1) for all servants of the Government of India within Native States; (2) for all British subjects within Native States, whether in the service of the Government or not; (3) for all native subjects of the Crown without and beyond British India. Similar powers as to special subjects are given by other Acts of Parliament. These powers have been given effect to by provisions in the Indian Penal Code (*x*), the Code of Criminal Procedure, 1898 (*y*), and other Acts of the Indian Legislature.

**1094.** In addition to these legislative powers, the Governor-General in Council, as the representative of the Sovereign, possesses certain inherent rights of jurisdiction outside the territorial limits of British India, which were declared and regulated by the Foreign Jurisdiction and Extradition Act, 1879 (*z*). By this Act the law relating

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(*v*) See Sir C. P. Ilbert, "The Government of India" (ed. 1898), pp. 406—463.

(*w*) Indian Councils Act, 1861 (24 & 25 Vict. c. 67), s. 22; Government of India Act, 1865 (28 & 29 Vict. c. 17), s. 1; and Indian Councils Act, 1869 (32 & 33 Vict. c. 98), s. 1.

(*x*) Act XLV. of 1860, ss. 3, 4, as amended by Act IV. of 1898, s. 2.

(*y*) Act V. of 1898, s. 54.

(*z*) Act XXI. of 1879, as amended by Code of Criminal Procedure, 1882 (Act X. of 1882); Repealing and Amending Act, 1891 (Act XII. of 1891), and Act V. of 1896. This authority is now exercised, not under Acts of the Indian legislature, but under the Indian (Foreign Jurisdiction) Order in Council, 1902, issued under the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37). This Order in Council expressly confirms everything done under the Indian Acts above

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to offences and criminal procedure in British India was extended to all European British subjects in Native States, and to all native Indian subjects of the Crown in any place beyond British India; and the Governor-General in Council was likewise empowered to exercise any jurisdiction which he possesses within any place outside British India, and to delegate that jurisdiction. It is under this power that orders are issued from time to time, analogous to English Orders in Council, which constitute civil and criminal courts of different grades in Native States, and declare the law they are to administer, being usually certain Acts of the Indian Legislature with specified modifications (*a*).

SUB-SECT. 7.—*Law in Native States.*

Native States.

**1095.** So far as the Native States generally are concerned, law, in the proper sense of the term, has been derived almost entirely from the example of British India. Apart from the personal law of Hindus and Mahomedans, contained in their sacred books—which is custom rather than law—little can be found corresponding to general enactments or rules of procedure. Among Hindus the verdict of the *panchayat*, or council of five, was clothed with a semi-religious sanction; and ordeals of a strange nature were appealed to for the decision of both civil and criminal disputes. Both of these primitive methods of administering justice were till very recently in full force in the autonomous State of Nepal (*b*). The Mahomedans possessed a crude code of criminal law, which the earliest British judges found themselves compelled to adopt; but its imperfections and eccentricities led first to its modification and very soon to its abandonment.

**1096.** The introduction of impersonal law into British India has exercised an influence on the Native States. At the present time almost every large Native State has established by its own authority a close copy of the British system of justice, with graded courts both civil and criminal, which administer law adapted from the codes, while reserving supreme appellate jurisdiction to the person of the ruling chief.

In the smaller States, where the chiefs do not exercise final criminal powers, the same result has been brought about more directly by the intervention of the British political officers, in whom is vested the reserved jurisdiction.

There are, however, some outlying parts of India, *e.g.*—Baluchistan (*c*)—where primitive criminal justice is still administered, under some amount of British supervision, by means of *jirgas*, or councils of local headmen, which have jurisdiction even in cases of murder.

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mentioned, which have been repealed by the Indian Extradition Act, 1903 (Act XV. of 1903).

(*a*) See Macpherson, Lists of British Enactments in force in Native States."

(*b*) In Nepal at the present day the killing of cows is punishable with death, and Brahmans are never capitally punished ("Imperial Gazetteer of India," Vol. XIX., p. 53).

(*c*) "Imperial Gazetteer of India," Vol. VI., p. 321.

# DEPOSITION.

*See* CRIMINAL LAW AND PROCEDURE; EVIDENCE.

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END OF VOL. X.

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